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A Constitutional Examination of Fiscal Relations between Central and Local Government in Mainland China

A Comparison between Mainland China and England

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List of Abbreviations

CCP. *Chinese Communist Party.*

PLC. *Politics and Law Committee of CCP*

EU. *The European Union.*

RSG. *Rate Support Grant*

UK. *United Kingdom of Great Britain and Northern Ireland*

GDP. *Gross Domestic Product.*

LGO. *Local Government Ombudsman.*

LBC. *London Borough Council.*

GLC. *Greater London Council.*

MBC. *Metropolitan Borough Council.*

FOIA. *Freedom of Information Act 2000.*

CTB. *Council Tax Benefit.*

CTRS. *Council Tax Reduction Scheme*

PRC. *People's Republic of China.*

USA. *United States of America.*

NPC. *National People's Congress.*

RMB. *Renminbi (Chinese Yuan).*

HKSAR. *Hong Kong Special Administration Region*

CCT. *Compulsory Competitive Tendering*

UCL. *University College London*

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Chapter 1: Introduction.

1.1 Introduction.

This thesis intends to explore a number of issues concerning the exercise of fiscal power in Chinese local government. The main purpose of this exploration rests in the seeking of solutions to a particular Chinese phenomena, and the hope that such a solution may be found elsewhere, particularly in the English legal system, and in the way local government finance works in England.

Under a unitary system of government, it is always taken for granted that local finance in mainland China is the duplication of centralism[1], that is, local government should be absolutely obedient to the central government and cannot enjoy autonomy. However, fiscal conflict and problems associated with the coordination between central and local government on fiscal matters have been a continuous feature in China, principally because the issue of fiscal power in local government has never been appropriately institutionalised [2] in the light of centralism. Questions on how the problem of local finance should be dealt with are always on the agenda of political practice and academic research. [3] The period between the establishment of the People's Republic of China (PRC) in 1949 and the enactment of the Budget Law (*yusuanfa*, 预算法) in 1994, saw three large-scale experiments in terms of the decentralization of fiscal power.[4]The first decentralization was operated between 1958 and 1960, because of the problems arising from highly centralized system at that time. The second, between 1970 and 1976, was launched against

1 Zhang Qianfan, 'Fiscal Decentralization in China: Problems, Experiences and Solutions', *Tribune of Political Science and Law*, Vol.29, No. 5 (2011), 96-103.

2 Ye Shan, 'Formation and Reinforcement of the Centralization of Power to Tax, Reviewing Normative Documents on Tax within the Latest 20 Years', *Peking University Law Journal*, Vol.24, No.4 (2012),124-141.

3 Miao Lianying & Cheng Xueyang, 'Revenue-Sharing Scheme, Local Loans and the Deepening of the Reform of Fiscal Relation between Central and Local Governments', *Journal of Henan Administrative Institute of Politics and Law*, No.4 (2009), 24-30.

4 Hu Shudong, *An Exploration of Central-Local Relation from the Perspective of Economic Development: Changes in Chinese Financial System*, (Shanghai: Sanlian Bookstore Press), 3.

the "Cultural Revolution(*wenhuadageming*, 文化大革命)", and the third one, called "the decentralisation of power and the transfer of profit (*fangquanrangli*, 放权让利)", worked between 1976 and 1994 with the intention of pushing the "Reform and Opening-Up (*gaigekaifang*, 改革开放)". However, it has been argued that the decentralization experiments ended in failure,[5] and Chinese local finance has never rescued itself from the problematic circle that "decentralisation generates chaos, while centralisation leads to inaction[6]".

According to Wang Shaoguang (王绍光), the third decentralisation gave rise to substantial reduction of the "two ratios"-----the ratio of government revenue to GDP and the ratio of central revenue to overall government revenue, and produced a weak central government with a frail central revenue.[7][8] To improve the "two ratios", and to reinforce the central revenue, as discussed in *China's 1994 Fiscal Reform: An Initial Assessment*, a "revenue-sharing scheme (*feishuizhi*, 分税制)" was put into practice in 1994, and the foundation of the current fiscal system in mainland China was laid along with the scheme. In the early years of the implementation of this scheme, it was acclaimed, by some economists, to be the "second generation economic theory of federalism", "Federalism, Chinese Style" and "Market Preserving Federalism"[9], although other scholars pointed out that the scheme was far from perfect[10]and led to a higher level of local expenditure.[11]After more than 20 years' in operation, questions related to fiscal inconsistency,

[5] Yu Changge, *A Study of the Fiscal Decentralization in China*, (Beijing: Economic Science Press, 2010), 153.
[6] Feng Xingyuan, 'Crux and Response: Fiscal Relation between Central and Local Governments', *People's Tribune,* Vol.20 (2010), 14-16.
[7] Wang Shaoguang, 'China's 1994 Fiscal Reform: An Initial Assessment', *Asian Survey*, Vol.37, No.9 (1997), 801-817.
[8] Wang Shaoguang is the first scholar who paid extra attention to the link between changes of the "two ratios" and their influence on Chinese state capacity after the third decentralisation experiment. His research in this respect was reflected in the treatise----*A Report on the Chinese State Capacity*, published by Oxford University Press (Hang Kong) in 1993. Wang's opinion was widely accepted in Chinese academic circle and political community, in a sense, other scholars working on the fiscal relation between central and local governments, including Liu Jianwen, Miao Lianying, Xiong Wei, Li Weiguang, Wei Sen, etc., base their research directly on Wang's conclusion.
[9] See Jin Hehui, Qian Yingyi, Barry R. Weingast, 'Regional Decentralization and Fiscal Incentives: Federalism, Chinese Style', *Journal of Public Economics,* Vol.89, September (2005), 1719-1742; Qian Yingyi, Gerard Roland, 'Federalism and the soft Budget Constraint', *The American Economic Review*, Vol.88, No.5 (1998), 1143-1162.
[10] Wang shaoguang, *China's 1994 Fiscal Reform*, 14-16.
[11] Chen Chien-hsun, 'Fiscal Decentralization, Collusion and Government Size in China's Transitional Economy', *Applied Economics Letters,* No.11 (2004), 699-705.

or, "fiscal game[12]" between the central and local governments, stemming seemingly from "revenue-centralizing and expenditure-decentralizing" in the light of the revenue-sharing scheme,[13] have gradually aggravated the situation and become an important source of social problems such as environmental contamination and the infringement of human rights in mainland China;[14] the re-construction of central-local fiscal relation seems to be extremely urgent.

No operable way forward is offered from within Chinese academic circles, although the study of "fiscal constitutionalism (to deal with financial issues from a perspective of constitutional law)" was approved for inclusion in Chinese universities as one of the basic subjects in 2014.[15] Most Chinese lawyers are inclined to explore relevant issues within the framework of the "centralization--decentralization" debate, with the proposed solutions focusing on conferring more power, especially fiscal legislative power, on local government[16]. This is possibly due to the obvious imbalance between local revenue and expenditure in the light of the revenue-sharing scheme. However, the mode of fiscal decentralization fails to provide a detailed scheme which could cure the aforementioned circle that "decentralization generates chaos, while centralisation leads to inaction". An alternative approach is to legalize central-local fiscal relation, and

[12] Wang Wenhua, 'A Study of the Fiscal Game between Chinese Central and Local Governments', *Social Science Research*, No.2 (1999), 86-91.

[13] Li Weiguang, 'Perfection of Revenue-Sharing Scheme should rest with the Conformability of Local Revenue and Expenditure', *Taxation Research*, No. 4 (2008), 15-17.

[14] Zhu Zhigang, 'Current Situation in Public Finance and the Reform of Fiscal System', *Public Finance Research*, No.1 (2008), 4-10.

[15] The Zhengzhou University of China funded the law school with 2 million Yuan (RMB) to set up a new subject----"fiscal constitutionalism" in 2014, and Professor Miao Lianying was appointed to be the director of the subject.

[16] See Miao Lianying & Wang Guiyu, 'Personalization of Local Government, Fiscal Decentralization and Central-Local Fiscal Relation', *Henan Social Sciences*, No.2 (2009), 72-79,225; Wang Liwan, 'A Study of the Constitutionality of Fiscal Devolution', *Journal of Shanghai University of Political Science & Law*, No.1 (2014), 72-79; Ren Jiantao, 'A Study of Central-Local Relation, A Perspective of Fiscal Decentralization', *Academia Bimestris*, No.1(2007),57-68; Zhang Qianfan, 'Sovereignty and Decentralization-----Fundamental Theory in Central-Local Relation', *Journal of National Prosecutors College*, No. 2 (2011), 63-86; Ou Shujun, 'Visible Constitutionalism, Allocating of Power between Central and Local Governments', *Peking University Law Journal*, No. 5 (2012), 112-135; Miao Lianying & Wu Lining, 'Main Bodies in the Legal Nexus of Central-Local Governments and Their Benefit Games', *Journal of Henan University of Economics and Law*, No.6(2012), 35-43; Zhang Qianfan, 'Centralization and Decentralization----Problem, Experience and solution in China', *Tribune of Political Science and Law*, No.5 (2011), 96-103; Zhang Qianfan, 'Centralization or Decentralization, A Cost-Profit Analysis on Local Self-Government', *Jiangsu Social Sciences*, No.5(2009), 135-141; Zhu Qiuxiang, *Revenue-Sharing, the Logics and Values of Fiscal Devolution*, (Beijing: Intellectual Property Publishing House 2008); Zhang Qianfan(edited), *Fiscal Federalism*, (Nanjing: YiLin Press).

Professor Zhang Qianfan (张千帆) is the chief proponent for the purpose of legalization.[17] It seems that the legalization mode manages to tackle potential chaos arising from centralization or decentralization, and the establishing of detailed legal rules is the main technique proposed in this approach.[18] However, the Chinese Constitution, the Constitution of 1982, is merely a paper constitution,[19] just like a paper tiger. Thus, enforcing statutes in the Chinese context is obviously beyond the ability of the legalization mode, moreover, a possible outcome of this mode might be the sharp rise of relevant statutes, rather than the improvement of local finance.

This thesis will look beyond the decentralization mode and the legalization mode favored by Chinese scholars, and apply a comparative mode, a constitutionally reflective comparison between mainland China and England, centering on power mechanisms and their constitutional background. Power is the predominant theme of constitutionalism; and how to keep a rein on the arbitrary exercise of public power is always an important target for modern constitutions. In the Chinese context, the so-called "fiscal game" is played out between the central and local governments, both of which are authorized to wield public power in order to achieve their political ends. Thus, fiscal power stands at the core of the fiscal relation between Chinese central and local governments; in fact, issues related to the operation of fiscal power in local government have been associated with some social problems, including the infringement of human rights, in mainland China.[20] In the meantime China is undergoing a social transition, which largely means reforms in the economic and political systems.[21] The policy of "Reform and Opening-Up",

[17] The position of Professor Zhang Qianfan went through a transformation from the decentralization mode to the legalization mode, with no explanation on relevant reasons.

[18] See Yang Haikun & Jin Liangxin, 'Basic Issues on the Legalization of Central-Local Relations', *Modern Law science*, No.6 (2007), 25-32; Zheng Yi, 'Necessity of the Legalization of Central-Local Relation', *Lingnan Journal*, No.5 (2011), 64-68; Shangguan Piliang, 'A Study of Constitutional Culture in the Context of the Legalization of Central-Local Relations', *Journal of Yunnan University (Law Edition*), No.5 (2011), 20-24; Zhang Qianfan & Ge Weibao (edited), *Legalizing Central-Local Relations*, (Nanjing: Yilin Press 2009).

[19] Lin Laifan, *From Constitutional Norm to Normative Constitution, A Preface of Normative Constitutionalism*, (Beijing: Law Press China 2001), 143.

[20] Ding Ying, 'Revenue-Sharing Scheme and its Influence', *Economic Research Guide*, No. 25(2014), 106-107.

[21] Xv Xianglin, 'Social Transition and Reform on the State Administration: Orientation on the Chinese Political Reform', *Journal of Political Science*, No. 1(2015), 5-12.

launched in 1978, mainly pushes the reform of Chinese economic system. It is argued that they also impact on the reform of Chinese political system, because of the contradictions between economic development and the lagging political system.[22] Thus, the exploration of power mechanisms works, in a sense, as an important part of Chinese political system of reform. As mentioned in the above paragraph, Chinese academic circles do not contribute to solving relevant issues; therefore and by utilizing a comparative method, i.e. drawing upon experiences or lessons from elsewhere, especially from England, offers the opportunity of providing an alternative way forward in the comparative analysis of Chinese issues. It is fair to suggest that England is known as one of the mother countries of modern constitutionalism and the rule of law; therefore using England as a comparator is an attractive proposition for a researcher from a country with a long-term tradition of dictatorship. Based on the above considerations, constitutional comparisons between mainland China and England will serve not only to contrast the two systems, but may provide an alternative approach and potential inspiration in the search for new and different solution to the perennial problems of Chinese fiscal problems between the central and local governments, and herein lies the value to this thesis.

1.2 Research Issues: Arbitrary Power in Local Finance.

As already noted, with the introduction of the revenue-sharing scheme in 1994, fiscal relationship between central and local governments in mainland China has transformed into a fiscal game: central government is squeezing the fiscal sources of local government as much as possible through "revenue-centralising and expenditure-decentralising", and local government seeks to react through the fiscal expansion.[23] In the process, fiscal power as exercised by local government

[22] ibid

[23] Yang Jun, 'An Analysis of the Fiscal Game between Central and Local Governments within the Framework of Revenue-Sharing Scheme', *Collected Essays on Finance and Economics*, No. 2(2012), 40-46.

is free from limitations, and consequently many social problems, including corruption and the violation of human rights, have been the result.[24]

1.2.1 Revenue Centralising and Expenditure Decentralising.

The fiscal relationship between central and local governments in mainland China is based on the revenue-sharing principle, which was identified by most Chinese commentators as being launched with the intention of strengthening central revenue in 1994.[25] As a result, the revenue-sharing scheme failed to halt or slow down financial centralization, despite differentiating tax categories between central and local governments,[26] and the dividing of revenue sources in accordance with the tax categories.[27] The contrary argument is that the revenue-sharing scheme resulted in an unparalleled centralisation in respect of local revenue.[28] For example, central government controls the tax sources, and regardless of the matter of central tax, local tax and central-local shared tax[29], local government have no power to determine how much money to collect from local tax and central-local shared tax. Therefore, local government depend more deeply on the central government for money than ever before[30].

However, as far as fiscal expenditure is concerned, Chinese local authorities are enjoying an incomparable decentralisation,[31] being responsible for the provision of more and more public goods and service but, and contradictorily, with no power to raise enough money themselves or actually make a demand on the public. The revenue-sharing scheme divided tax categories in the

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[24] Cheng Xueyang, 'Re-exploring the Constitutional basis of the Land System in Mainland China', *China Law Review*, No. 2(2015), 134-144.

[25] Yang Zhiyong, 'How Revenue-Sharing Scheme work in Practice?' *Sub-National Fiscal Research*, No.10 (2013), 6-10.

[26] See the article 15 of the Budget Law 2014.

[27] Sun Dechao & Yan Yu, 'Evaluation and Analysis on the Practical Results of the Revenue-Sharing Scheme', *Economic Review*, No. 6 (2009), 39-41.

[28] Wang Xvkun, 'Vesting Financing power to Local Government and the Budget Reform', a conference paper presented to "the annual conference of tax law" in 2012.

[29] Sun Dechao & Yan Yu, 'Evaluation and Analysis on the Practical Results of Revenue-Sharing Scheme', *Economic Review*, No. 6 (2009), 39-41.

[30] Guo Weizhen, 'An Examination on Debt Financing Power of Local Government within the Framework of Fiscal Federalism', *Journal of Henan Administrative Institute of Politics and Law*, Vol.3 (2007), 18-25.

[31] Zhang Qianfan, *Fiscal Decentralization in China*, 96-103.

name of central tax, local tax and central-local shared tax, but functions between central and local governments are left untouched. This means that in the light of the revenue-sharing scheme,[32] there is little clarity between the functions that should be funded by local tax and central-local shared tax, or which function should be funded by central tax. Thus, with the differentiation of tax categories, fiscal expenditure which was undertaken by central government, such as basic education, public health and pensions, has been transferred to local government. During the period between 1994 and 2006, central revenue accounted for 52% of the general revenue and the local revenue made up 48%; while the central expenditure accounts for 30% of the general expenditure and the local expenditure made up 70%[33]. It is quite clear that expenditure-decentralising, undoubtedly adds to the fiscal burden of local government, and the "revenue-sharing" is criticised as little more than a scheme of buck-passing[34].

Against the background of "revenue centralising and expenditure decentralising", Chinese local government have experienced fiscal difficulties which could not be covered by locally collected revenue. To deal with this financial predicament, local government in mainland China, embarked on a fiscal expansion through land finance.[35] Generally speaking, land finance in Chinese context means that local finance is funded mainly through the selling of the usage rights of state-owned land,[36] which will be touched upon in the following section and discussed in detail in chapters 2 and 3.

[32] Zhu Qiuxiang, 'Tendency and Feature of Administrative Decentralisation in China', *Journal of Politics and Law,* No. 11 (2009), 12-20.
[33] ibid
[34] Feng Xingyuan, 'Crux and Approach: Fiscal Relation between Central and Local Governments', *People's Tribune*, Vol.20 (2010), 14-16.
[35] Wen Laicheng, 'Attention Should be paid to the Risks of Land Finance', *Cai Kai Yan Jiu*, No. 7(2014), 3.
[36] Luo Zuchun, *A Study of the Chinese Land Finance*, (Beijing: Economic Science Press 2012), 3.

1.2.2 The Expansion of Land Finance.

Fiscal difficulties, resulting from the "revenue-centralising and expenditure-decentralising" situation, produce the phenomenon of local finance becoming dependent on the central government[37]. However, arguably, the payment transfer system, which may, in theory, relieve the fiscal difficulties of local government through a system of grants from central government, is likely to fail, or at least is not likely to work well.[38] Against this backdrop, Chinese local government become addicted to expanding their fiscal basis through land finance, which helps them secure much more money and more easily.[39] In the process, corruption flourishes, social contradictions between the public and officials are sharpened, and fiscal risks faced by Chinese local government are increased[40].

According to the article 10 of the 1982 Chinese Constitution, the ownership of land, in the Chinese context, belongs to the state, or the Chinese government; local government are authorised to sell what are called in the West –- the user rights of state-owned land, in the light of the 1988 amendment of the 1982 Chinese Constitution. In the process of land finance, local government tend to sell the "use rights" of state-owned land to property firms, and the property firms construct and sell commercial or residential buildings to make money. Local government receive the money paid for the use rights of the land, and relevant tax from the selling of the commercial or residential building. [41] The higher the land price, the more money local government may obtain. The money obtained might best be described as a kind of 'off-budget' windfall, free from the scrutiny of People's Congress.[42] In simple terms this meant that the rate

[37] Wang Yuhua & Chang Jin, 'Institutional Causes and Potential Countermeasures of Fiscal Difficulties in Local Governments', *Journal of Shandong University of Finance*, No. 1 (2006), 36-39.
[38] Hu Yifang & Xiong Bo, How to Improve and Perfect the Payment Transfer System, *Public Finance Research*, No.8 (2008), 48-49.
[39] Cheng Ming, Multiple Risks of Land Finance and Their Political Interpretation, *Reform of Economic System*, No.5 (2010), 27-31.
[40] Miao Lianying & Cheng Xueyang, *Revenue-Sharing Scheme*, 24-30.
[41] An Tifu & Dou Xin, 'Land Grant Fee: Actuality, Issues, and Policy Recommendations', *Journal of Nanjing University (Philosophy, Humanities, and Social Sciences)*, No.1 (2011), 23-31.
[42] Xu Duoqi, 'A Study of the Legitimacy of the Off-Budget Revenue', *Law Science*, No.4 (2013), 69-75.

of the local government levy and the subsequent expenditure were free from scrutiny of any kind. With the amendment of the Budget Law in 2014, all expenditure by local government should be checked by the People's Congress[43], but the check is only formal[44], rather than substantial. As a result, Chinese local government are not answerable for their fiscal decision-makings in the development of land finance.[45]

Figures show that in 2007, of the total amount of local revenue which amounted to 2.3 hundred million Yuan (RMB), land sale contributed 1 hundred million Yuan (RMB).[46] By the end of 2010, local government relied on land sale to generate 71.7% of its revenue.[47] In effect, local finance has transformed into land finance,[48] which is used to facilitate local revenue to grow super-speedily, but which also creates plenty of social tragedies and group conflicts as well as environmental pollution and the waste of resources[49]. In the development of land finance, the land preferred by property firms is always in an excellent location with the greatest potential, and any existing buildings on the land are pulled down to construct new buildings. To clear away obstacles to land finance, forced eviction (*chaiqian*, 拆迁) of the existing buildings without compensation, is a constant and permanent demonstration of the arbitrariness in this area, which always works as a twin sister of land finance.[50] By way of example, the incident of *Tang Fuzhen* (*tangfuzhenshijian*, 唐福珍事件) is a typical of the tragedy that can occur in the expansion of land finance. Tang was the owner of a private garment factory, and the use right of the land on which her factory was located was sold by her local government authority, without her being

[43] See the article 4(2) of the Budget Law.

[44] Zhu Daqi & Li Rui, 'A study on the Reform of the Examination and Approval of Local Government Budget', *Contemporary Law Review*, No. 4 (2013), 101-108.

[45] Fu Jingtao & Ni Xing, 'A Study of the Accountability Mechanism and Its Changes in Chinese Local Government', *Contemporary Finance and Economic*, No.8 (2012), 36-45.

[46] Cheng Mo, 'Land Reform is speeding up', *Window of the South*, No.19 (2008), 31-35.

[47] Ministry of Finance of People's Republic of China, A Report on the Implementation of Central and Local Budge 2011 and Draft Budget of Central and Local Budge 2012 (online), downloaded from http://news.xinhuanet.com/politics/2012lh/2012-03/16/c_111666182.htm (accessed on 08-10-2015).

[48] Wu Yue, 'Three Issues about Land Finance and Institutional Change', *Tribune of Political Science and Law*, No. 4 (2011), 28-40.

[49] Zhang Qianfan, *Fiscal Decentralization in China*, 96-103.

[50] Liu Dongliang, 'Causal Analysis of Forced Eviction', *China Legal Science*, No.4 (2012), 138-150.

informed. To prevent her factory from being forcibly demolished by local government with no compensation, she burnt herself to death in the presence of armed staff from local government. However, no one was held accountable for Tang's death in any form: the people's congress and the people's court in her local government did nothing. A local official even said that Tang died from the lack of legal consciousness.[51] In fact, Tang knew about her rights, and that is why she tried to protect the use right of her factory. However, the exercise of governmental power in the way just demonstrated, is out of control in pushing forward the expansion of land finance. This kind of arbitrariness gave rise to the inexcusable disenfranchisement of the rights of the poor woman. *Tang Fuzhen Tragedy* is a representative case in respect of the expansion of land finance, but it is not unique, there are a lot of persons like *Tang Fuzhen* in China, whose human rights are infringed in the process of land finance and no one is accountable. Theoretical and practical elements behind *Tang Fuzhen Tragedy* will be discussed in chapters 2 and 3.

From what has been written so far it should have become clear that damaging fiscal pressure has created a negative impact on the sustainable development of Chinese society. This lack of sustainability extends to areas of human rights, to dignity, justice and fairness, even democracy and the rule of law, which may trigger an economic crisis in local government, and eventually bring about a constitutional crisis. The questionable pressure on local government, seems to be originated immediately from the "revenue-centralising and expenditure-decentralising" in the light of the revenue-sharing scheme. However, this does not mean that "revenue-centralising and expenditure-decentralising" should be responsible for all the issues in central-local fiscal relation in mainland China. In fact, public power is obviously out of control in the expansion of land finance, and this is regarded to bring about such problems as corruptions, social contradictions[52],

[51] Zhong Changlin, 'The Death of the Woman made me Grieved', *Southern Urban Daily,* 03-12-2009.

[52] Here, social contradictions means conflicts between government and citizens which reside in the jurisdiction of the authorities which expand land finance. Most of the contradictions are resulted from forced evictions, and some from the introduction of polluted enterprises and the negative influence of corruption. In a sense, *Tang Fuzhen* Tragedy, discussed in Pages 9-10, is a kind of extreme solution for ordinary Chinese people. There are also measures citizens may employ to respond to the forced evictions, especially when more persons are involved, and the basic aspect of the measures refers to a strategic rivalry, that is, a group of involved citizens unify to protect their estates by sit-down demonstration in

the breach of human rights, and even the environmental pollution.[53] Therefore, "revenue-centralising and expenditure-decentralising", which seemingly produce difficulties in local finance and the fiscal dependency of local government upon central government, are merely surface phenomena, and fierce power may provide the proper perspective to explore the deep-rooted factors underpinning the fiscal expansion in the name of land finance. In this sense, the exploration of the questionable fiscal relation between central and local governments in the Chinese context, may be focused on the power mechanisms in local government, which will be further discussed theoretically and practically in chapters 2 and 3, and illustrated in chapter 5.

1.2.3 Exploring the Significance of Research Issues.

Two reasons which make the exploration of fiscal issues in Chinese local government the research theme of this PhD thesis, may be defined as follows. On the one hand, the negative influence of the apparently unhealthy fiscal relationship which has impacted on the expansion of land finance in local government, and the resulting social problems arising from the fiscal expansion which have become identified as one of the main social problems in mainland China,[54] are begging the need for an urgent practical solution to deal with them. Against this backdrop, the damaging fiscal relationship has become an important theme in areas of sociology, economics, public finance, finance and tax law, constitutional law, etc., and Chinese scholars, with specialized knowledge of these disciplines, are examining relevant issues from different perspectives. Therefore this thesis attempts to reflect on some of these mainstream themes in Chinese scholarship by utilising a different method of approach, but it does not propose to offer, in its conclusions, a complete or final solution to these Chinese issues.

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front of the office building of local government, or through armed conflicts with staff members of government. The conflicts cannot change the decisions of local government in pushing land finance, but may admonish local government not too brutish in the unlimited expansion of land finance.

[53] Yue Guining, Teng Lili & Wang Chunhua, 'A Study on Land Finance in Local Governments', *China Opening Herald*, No. 3(2009), 49-54.

[54] Wang Yongjun, 'Fiscal Relation should be Re-Construct', *People's Tribune*, S2 (2013), 43.

The second reason for the theme of this PhD thesis concerns the exploration of powers in respect of central-local fiscal relations, which is regarded as being an approach to the "constitutional moment[55]" in mainland China, and public lawyers hope to activate the paper Constitution through the settlement of relevant issues.[56] Since the Reform and Opening-Up, most public lawyers, have been seeking a way to make the 1982 Chinese Constitution work as a mechanism which may facilitate the restriction of powers and the protection of human rights, with the research focus being placed firstly on questions relating to the system of judicial review.[57] However, relevant researches receive no response from Chinese theory and practice, because no definition of judicial review was included in any amendment of the 1982 Constitution (this point will be discussed in chapter 2), and no mechanism was established in practice to exercise the judicial examination power (this point will be discussed along with the administrative litigation in chapter 3). This is disappointing to Chinese scholars, who have had to turn the focus of their research to the fiscal power in local government, largely because of the realistic problems in this field, which have been touched upon earlier in this chapter. Meanwhile, it seems that public lawyers have not given up on the idea of activating the 1982 Constitution. In *Fiscal Constitutionalism: Theoretical Foundation of Chinese Constitutional Moment*, Li Long (李龙) and Zhu Kongwu (朱孔武) argued that the resolution of fiscal problems may provide China with a constitutional moment, or a channel to make the Constitution 1982 work,[58] although they did not clarify why this kind of exploration should be a constitutional moment, and how to make it operational as such. This

[55] Li Long & Zhu Kongwu, 'Fiscal Constitutionalism: Theoretical Foundation of Chinese Constitutional Moment', *Juridical Science Journal*, No. 3 (2004), 8-10.

[56] Miao Lianying & Zhang Heng, 'Exploring the Development of Fiscal Constitutionalism in Mainland China', *Tribune of Study*, No.2 (2015), 75-77.

[57] See Chen Yunsheng, *Rationales and Mechanisms of Judicial Review*, (Beijing: Beijing Normal University Press 2010); Mo Jihong, *Theory and Practice of Judicial Review*, (Beijing: Law Press China 2006); Fan Jinxue, *Judicial Review in America*, (Beijing: China University of Political Science and Law Press 2011); Miao Lianying, 'Tentative Plan on the Establishment of a Specific Body Undertaking the Constitutional Supervision', *Studies in Law and Business*, No.4 (1998), 3-9; Miao Lianying, 'The Chinese Judicial Review: Possible? How to be Possible?' *Journal of Zhengzhou University (Philosophy and Social Science Edition)*, No.4 (2004), 46-52; Lin Laifan, *A Proposal on Establishing of the Transfer Mechanism of Constitutional Review*, Conference Paper submitted to Seminar on Chinese-Japanese Public Law (Beijing) in 2015.

[58] Li Long & Zhu Kongwu, 'Fiscal Constitutionalism: Theoretical Foundation of Chinese Constitutional Moment', *Juridical Science Journal*, No.3 (2004), 6-8.

thesis will explore power mechanisms and their practical implications in respect of local finance in both mainland China and England. The aim of such an exploration is to suggest possible answers to the issues already raised regarding the constitutional moment in mainland China, or, failing that, to offer directions to the place in which answers may be found.

1.3 Methodology: A Historical Constitutional Reflective Comparison.

This thesis will employ a comparative approach, in other words, a historical constitutional reflective comparison between mainland China and England, in the exploration of issues concerning the exercise of fiscal power in local government in China. There will be four parts to this section, and the first will explain the implications of the specific research method. The second part will be a general reflection on the comparative method in constitutional research, and how to use the comparative technique as a foundation of the comparisons between mainland China and England. The third part is about the development of constitutional comparisons in mainland China and will touch upon the functions and limitations of these constitutional comparisons. The concluding part will present an analysis of why the specific method is adopted and used for this thesis.

1.3.1 Implications of the Historical Constitutional Reflective Comparison.

The meanings of the specific method, i.e. a historical constitutional reflective comparison, will be interpreted as follows. First, the key word "comparison" implies, on the one hand, two reports, one being from China, focusing on the theory and reality of Chinese power mechanisms in respect of local finance in chapters 2 and 3, and the other from England, with the same focus on the

power mechanisms in England in chapter 4; on the other hand, the exploration of the Chinese issues will benefit from a reflective comparison between mainland China and England in chapter 5. Reasons as to why a comparative method is applied, and why England is chosen as one side of the comparisons, is set out below in 1.3.3 and 1.3.4.

In terms of the three adjunct words-----"historical", "constitutional", and "reflective", three points needed to be explained. First, "historical" implies that a historical perspective will be used in the exploration of Chinese issues, that is to say, historical elements concerning the constitutional backdrop and the fiscal situation will be touched upon, and the conclusions of the thesis will be made, drawing partly from the evolutionary feature of the constitutional system in England. The constitutional system both in England and mainland China have undergone historical developments, and the process is still ongoing. On the one hand, the idea of constitutionalism was imported to China at the close of the 19th century[59], and the declaration that "the state values and safeguards human right[60]" was written in 2004 as an amendment to the 1982 Chinese constitution. Now that China is in a period of social transition;[61] political restructuring is expected to happen sooner or later.[62] On the other hand, in England, the idea of legal evolution, established in the eighteenth century, was widely accepted as a distinctive feature of the common law.[63] The changing constitution, from the signing of Magna Carta 800 years ago, until the enactment of the Human Rights Act in 1998 and the on-going constitutional reform, demonstrates a legal evolution from a constitutional perspective. A law is often regarded as being a cultural phenomenon,[64] and elements behind the superficial reading of the law are open to investigation when seeking the deeper meaning of a legal provision, as is the historical

[59] Zhang Jinfan & Zeng Xianyi, *A Brief History on the Constitutional Ideas in China*, (Beijing: Beijing People's Press 1980), 9.

[60] See the article 33(3) of the Chinese Constitution 1982.

[61] Zhou Xiaohong, 'Social Transition in China and the Historical Mission of the Social Sciences', *Nanjing Journal of Social Sciences*, N0. 1(2014), 7-16.

[62] Bao Xinjian, 'Reforms on the Political Restructuring is the Urgent Demand of the Chinese Social Transition', *Theoretical Investigation*, No. 3(2001), 10-14.

[63] Peter Stein, *Legal Evolution: The Story of Idea*, (Cambridge: Cambridge University Press 1980), 1.

[64] Pierre Legrand, 'How to Compare now', *Legal Studies*, Vol. 16, July (1996), 232-242.

background and context which exists 'behind the scenes'.[65] Although historical perspective has been considered by some as being misguided and old-fashioned,[66] the historicity and the evolving character of the constitutional system in the two countries should not be denied and neglected.

Secondly, "constitutional" shows that relevant issues will be explored from the perspective of constitutional law, and the exploration will involve the constitutional system behind power mechanisms, given the power peculiarity of relevant issues. To be exact, the exploration of Chinese issues will be focused on the power mechanisms in both constitutional theory and practice, and the English report will focus on the operation of the power mechanisms and the underlying rationales. Finally, "reflective" reveals the function of relevant comparisons, that is, the evaluation of Chinese issues in the light of the findings from the comparisons.

1.3.2 A General Reflection on Constitutional Comparisons.

In general, a constitutional comparison means the "systematic application of the comparative technique[67]" to the relevant fields of constitutional law through "the systematic comparison of two or more legal systems, or of parts, branches or aspects of two or more legal systems[68]". The notion of comparative constitution is now used as an important part of legal education[69], a practical tool of national legislation within a country, and a helpful reference in court decisions[70] in more and more countries.

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[65] ibid

[66] J. W. F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law (revised edition)*, (Oxford: Oxford University Press 1996), 27.

[67] W.J. Kamba, 'Comparative Law: A Theoretical Framework', *International and Comparative Law Quarterly*, Vol. 23, July (1974), 485-519.

[68] ibid

[69] John Henry Merryman, 'Comparative Law and Social Change: on the Origins, Style, Decline & Revival of the Law and Development Movement', *The American Journal of Comparative Law*, Vol.25, No.3 (1977), 457-491.

[70] Martina Künnecke, *Tradition and Change in Administrative Law: An Anglo-German Comparison*, (Berlin Heidelberg: Springer 2006), 5.

The grouping of legal families is a prerequisite of constitutional comparisons, and legal systems all over the world may be placed in different categories in accordance with different grouping methods. The most widely accepted standard so far is raised by Arminjon/Nolde/Wolff. According to Arminjon/Nolde/Wolff, the worldwide legal systems are divided into seven families, i.e. the French, German, Scandinavian, English, Russian, Islamic, and Hindu[71]; and the criterion for the classification rests with the *substance* of legal systems, that is, the "originality, derivation, and common elements[72]". Some scholars argued that the grouping method by Arminjon/Nolde/Wolff paid much more attention to private law[73], and heavily weighted towards the civil law and the common law families[74]. Besides, the classification of the seven legal families failed to accommodate the shifting of legal systems from one group to another, and the emergence of new legal system[75]. Although no unified standard could be provided to define various legal families, the fact that legal systems in different countries have different historical backgrounds, different mode of thinking in legal matters, distinct legal sources, ideology,[76] and different cultural support[77], cannot not be denied. As for Chinese law, Zweigert classed it as the law in the Far East.[78]

Globalisation[79], and the seeking of principles and concepts common to all "civilised" systems of law, promote the development of constitutional comparisons, regardless of whether they are in a supra-state or sub-state dimension, or in western or eastern countries[80]. Arguably some mutual

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[71] Arminjon/Nolde/Wolff, Traite droit compare, quoted from Konrad Zweigert & Hein Kotz, *Introduction to Comparative Law* (third Revised Edition), (Oxford: Clarendon Press 2011), 64.

[72] ibid

[73] Konrad Zweigert & Hein Kotz, *Introduction to Comparative Law*, 65.

[74] Esin *Orücü*, A General View of "Legal Families" and of "Mixing Systems", in Esin Orücü & David Nelken (edided), *Comparative Law: A Handbook,* (Oxford: Hart Publishing 2007), 170.

[75] Konrad Zweigert & Hein Kotz, *Introduction to Comparative Law*, 66.

[76] ibid, 67-69.

[77] Pierre Legrand, *How to Compare Now*, 232-242.

[78] Konrad Zweigert & Hein Kotz, *Introduction to Comparative Law*, 268.

[79] The globalisation is argued to have pushed the modernisation of the emergence of Asian and African legal systems, see Werner Menski, *Comparative Law in a Globalisation Context: the Legal Systems of Asia and Africa* (second edition), (Cambridge: Cambridge University Press 2006).

[80] Rosalind Dixon, 'A Democratic Theory of Constitutional Comparison', *The American Journal of Comparative Law,* Vol.56, No.4 (2008), 947-997.

values supported "the emergence of a common law for Europe[81]", and represent the essence of American constitutional comparison and what is called the "functional constitutional democracies[82]" in Eastern Asia. However, the constitutionalism in an increasing globalized world, is experiencing the co-evolution of constitutional values in different territories due to identical cultural influences and considerable shared social and economic policy problems[83]. In this sense, comparisons between mainland China and England may bear some signs of the pursuit of universal values in terms of power mechanisms, or the principles of institutional rationality, which will be reflected in the comparisons in chapter 5.

In terms of how to use the comparative techniques in constitutional comparisons between various legal families, or aspects of different legal systems, "careful attention should be focused on the similarities and differences among the legal systems being compared[84]", which, for some writers, forms part of the definition of comparative law.[85] It has been argued that: (1) why and where a comparison between different legal systems should focus on differences, or on similarities, there is no consensus offered by the comparative lawyers;[86] (2) some comparative lawyers have generally emphasized differences, while others see similarities, and a third group has sought to strike a balance between observing and analysing similarities and differences;[87] (3)proper balance between looking for similarities and for differences depends on the purpose of the comparative enquiry[88]; (4) the issue of differences or similarities should be linked to the various steps which are involved in a comparative legal enquiry, and some steps require more focus on

[81] Pierre Larouche, 'Ius Commune Casebooks for the Common Law of Europe: Presentation, Progress, Rationale', *European Review of Private Law*, Issue 1 (2008), 101-109.
[82] Yeh JiunnRong and Chang Wenchen, 'The Emergence of East Asian Constitutionalism: Features in Comparison', *The American Journal of Comparative Law*, Vol.59 (2011), 805-839.
[83] Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 947-997.
[84] John C. Reitz, 'How to do Comparative Law', *the American Journal of Comparative Law*, Vol. 46, No. 4 (Autumn 1998), 617-636.
[85] Konrad Zweigert & Hein Konz*, Introduction to Comparative Law*, 1.
[86] Gerhard Dannemann, Comparative Law: Study of Similarities and Differences? in Mathias Reimann & Reinhard Zimmermann (edited), *The Oxford Handbook of Comparative Law*, (Oxford: Oxford University 2008), 384.
[87] Gerhard Dannemann, *Comparative Law: Study of Similarities and Differences*, 385-396.
[88] ibid, 384-385.

similarities, others on differences, and many call for a balance of both.[89] As for purposes of legal comparisons between different legal families or legal systems, such options as unifying law, solving particular problems, applying foreign law, facilitating choice between legal systems, and understanding law[90], may be included.

The above argument presents a foundation for the comparative work in this thesis, which as mentioned in the sections 1 and 2 of this chapter, rests with the exploration of fiscal power in Chinese local government, which give rise to many social problems in mainland China. In the light of Dannemann's argument, this thesis focuses on seeking approaches to solving particular issues in China, in the process, constitutional comparisons are employed to illustrate how similar situations are dealt with, or how fiscal power is exercised, in an English constitutional context. That is to say, the purpose of this thesis determines that the constitutional comparisons should pay attention to both similarities and differences; the similarities provide a commonality of the problems and the differences reveals how similar problems are treated in different constitutional contexts.[91]

Based on these considerations, there are at least two points which might help to explain the similarities in terms of the fiscal situations in mainland China and England, and the feasibility of constitutional comparisons between the two countries. These factors, discussed further in chapter 5, might be briefly outlined as follows: (1) the weak constitutional position of local government is a common phenomenon in the two countries to be compared. Here, some points about Chinese local government need to be clarified. Firstly, there is no explicit definition of local government provided by the 1982 Chinese Constitution, but article 95 of the Constitution says that

[89] ibid, 406-417.

[90] ibid, 401-407.

[91] It seems that the comparisons in this thesis bear a bit of functionality, because of the search for better solutions to Chinese issues. Although the functionalism is said to be a basic methodological principle of all comparative law, it will not work well in responding to Chinese issues, for its focus are often placed on various judicial responses to similar situations. In fact, it is widely accepted that functionalism works better in the field of private law in a narrower context of European legal systems, and is limited in the public law comparisons.

government should be set up in provinces, counties and villages. [92] This article is considered by Chinese scholars to have established a three-tier local government system in China.[93] Within the three layers, provincial government is chosen as a comparator to English local government, and the relevant reasons include:

a. provincial government is much more influential than county and village governments. For one thing, industrial enterprises and service sectors always like to be set up within the jurisprudence of provincial government due to the potential consumer market of relevant products.[94] This means that provincial government may control more financial resources and may have more potentiality to expand land finance. The other thing is that the leader of provincial government is said to have a practical control over county and village governments in terms of money.[95]

b. There is no clarification of status and functions of local government in the Chinese Constitution (this will be touched upon in the following points and further discussed in chapter 2), and the relations between provincial and central governments are similar with those of provincial and county governments, or those of county and village governments. As shown in the previous point, provincial government is more influential in central-local relations and the relations of inter-local governments, so, it is fair to say that provincial government is more representative in terms of central-local relation.

c. Local government in England is the only tier of government elected by local electorates under the Westminster system, that is to say, multi-layered local government is unavailable in

[92] See the article 95 of the Chinese Constitution 1982.

[93] Gong Guizhi, 'Status Quo and Reform about Chinese Local Government System', *Journal of Political Science*, No. 2, 2000, 64-74.

[94] Bao Guoxin, 'Practices of Public Finance in Provincial Government', *Journal of Nanjing University (Philosophy, Humanity and Social Science),* No. 6, 2006, 121-128.

[95] Yang Liangsong & Pang Baoqing, 'A Study of the Influence of Provincial Leader on Local Expenditure', *Journal of Public Administration,* No. 4, 2014, 79-118 &119-120.

the English context. Given the symmetrical characteristic of comparisons, it is reasonable to choose one layer instead of all layers of Chinese local government as the comparator of local government in England. Because of these reasons, Chinese local government in this thesis means provincial government.

Secondly, the Chinese Constitution does not provide local government with a formal status except for an ambiguous principle about how to deal with central-local relationships, and the principle will be discussed in detail in chapter 2. In terms of how to deal with relations between different tiers of local government, there is no clear and practicable provision offered on this principle either.[96] In addition, the ill-defined principle provides no criterion in the division of governmental functions between tiers of governments. As a result, the vague provision of the Constitution leads to, on the one hand, the ambiguity of local government functions, or the similarity of governmental functions between central and local governments, and on the other hand, the possibility of buck-passing from central government to local government. In practice, functions which should be undertaken by Chinese local government now include education, health care, pensions, police, court, etc. In England, local authorities do not enjoy a constitutional status due to the nature of the uncodified constitution itself. In the meantime, local authorities are corporations, established on the authorisation of Parliament statutes,[97] and Parliament could take away functions from local authorities easily, in much the same way as it confers powers on them. (2) Against the weak status of local government in the Constitution or in constitutional law, local authorities in mainland China and England depend on central government for money in order to provide social services and other public services. These similarities may raise two questions in terms of the constitutional systems: the one concerns the causal factors of the similarities, and the other is related to the different trend or result in terms of the exercise of fiscal power in local

[96] Xie Qingkui, 'A Study on Inter-Governmental Relations in China', *Journal of Peking University (Humanities and Social Sciences)*, No.1, 2000, 25-33.

[97] David Feldman QC, FBA & Andrew Burrows QC, FBA, *English Public Law* (second edition), (Oxford: Oxford University Press 2009), 214.

government, against the similar situations of local finance. The former seems to be fundamentally linked to the nature of the unitary constitution shared by the two countries, which is not included in the research scope of this thesis, and the latter is related to the differences in the power mechanisms and the constitutional context of the two countries, which will be touched on in the following paragraphs and further discussed in chapter 5.

Some scholars hold that "law is an indissoluble amalgam of historical, social, economic, political, cultural, and psychological data, a compound, a hybrid… [98] ", and the cultural factors underpinning a legal family or a legal system, should be involved in a comparative work[99]. That is to say, it is important to read beyond the lines of a legal system and beyond the words of legal provisions; moreover background information should be included in legal comparisons to ensure a real understanding of relevant legal systems. This is a position recognised by this thesis, and reflected upon in the historical perspective of the research method, clarified in 1.3.1. However, Legrand goes further and suggests comparatists should look at linguistic, psychological, economic factors, etc.[100] This, may be a little too ambitious for a PhD thesis, which is written in a second language; but such a difficulty may reveal one of the limitations of the constitutional comparisons in this thesis, which obviously does not touch the psychological, and linguistic elements.

1.3.3 Constitutional Comparisons as a Development Factor in Mainland China.

[98] John Law, *Sociology of Monsters: Essays on Power, Technology and Domination* (Sociological review Monograph), (London: Routledge 1991), 18.

[99] Pierre Legrand, *How to Compare Now*, 232-242.

[100] ibid

In mainland China, comparative law, with the inclination of solving Chinese issues[101], has propelled the emergence and development of a modern legal system and constitution. Chinese comparative law was said to be initiated, before the Opium War, by English businessman who traded with the Chinese, and by Western missionaries. This was due to the real need to address disputes and litigations between the Chinese and the English, arising from bilateral transaction[102], and this had an immediate effect on the legal reform at the end of Qing Dynasty (1644A.D.-1912A.D.)[103]. The Chinese character-----"宪 (*xian*)", which means constitution now, represented laws and decrees in ancient times[104], and this, in a sense, hints the absence of constitutional institutions in modern sense in the Chinese tradition[105]. In fact, the Chinese tradition is regarded as being the pattern of the rule of man[106], in other words, what a despot said was law – *was* law, and the whole of society was absolutely controlled by despotism, where obligations were substituted for human rights.[107] Comparative law, in a sense, promoted the introduction of constitutionalism with modern meanings from Western countries. The enactment of the Constitutional Outline Made by the Imperial Order 1908 (*qindingxianfadagang*, 钦定宪法大纲) at the end of Qing Dynasty, along with an intention of "rescuing the country and saving the Chinese nation[108], was considered to be a fundamental dividing line between traditional and modern jurisprudence in mainland China. During the process, legal translation and transmission about the constitutional theories and practices in Western countries, especially in the UK (the

[101] He Qinhua, 'Comparative Law in Modern China', *Chinese Journal of Law*, No.6 (2006), 127-139.

[102] Wang Pei, 'Comparative Law in China: Current Situation and Prospects', *Journal of the East China University of Political Science and Law*, No.1 (2008), 155-158.

[103] He Qinhua, 'Birth and Growth of Chinese Constitutional Jurisprudence', *Contemporary Legal Science*, Vol.18, No.5 (2004), 142-155.

[104] Hu Jinguang & Han Dayuan, *Chinese Constitution* (Second Edition), (Beijing: Law Press. China 2007), 20.

[105] He Qinhua, *Birth and Growth of Chinese Constitutional Jurisprudence*, 142-155.

[106] Li Buyun & Wang Liming, 'Could the Rule of Man be integrated into the Rule of Law', *Chinese Journal of Law*, No.2 (1980), 42-47.

[107] Xue Zhongyi & Li Xiaoying, 'The Feature and the Rooted Causes of the rule of Man in China: A Historical Perspective', *Journal of Liaoning University (Philosophy and Social Science Edition)*, No.4 (2002), 53-56.

[108] Miao Linying & Wang Yu, 'A Study of the Constitutional construction in Modern China from a Perspective of Traditional Homeland Consciousness', *Journal of East China University of Political Science and Law,* No.6 (2002), 49-57.

motherland of modern constitution) and the USA (the birthplace of the most long lived written Constitution in the world),[109] formed the main path dependence in the development of Chinese constitutional law. Because of the backwardness of the Chinese constitutional system, the then comparative work between China and UK or USA, was concentrated on the introduction of some basic ideas, such as constitutionalism generally, ideas relating to the rigid constitution, the flexible constitution, the interpretation of the constitution, the amendment to a constitution, presidential government, constitutional monarchy, etc.[110] At that time, the Magna Carta was always invoked in discussing the significance of a constitutional law and in the question of the limitation of powers,[111] but there was no comparisons between the Magna Carta and the Constitutional Outline Made by the Imperial Order, or any Chinese constitutional document.

The establishment of the PRC in 1949 did not change the above path dependence, and the 1954 Chinese Constitution was, to a degree, also the result of constitutional comparisons, with the target of affirming the legitimacy of the regime by the CCP[112]. The 1954 Constitution drew upon not only the Constitutions of former Soviet Union and some eastern European countries, but also the French Constitution[113] to seek legitimacy and support for the new-born political power[114], but academic research in comparative law did not move forward until the 1980s,[115] owing to the monopoly of class analysis during the period of time. Arguably, the comparative method was revived in the formulation of 1982 Chinese Constitution, when public lawyers attempted to discover some general characters of constitutionalism and the personality of Chinese Constitution by putting the Chinese constitutional system into the Western mode of constitutionalism via a

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[109] Yeh JiunnRong and Chang Wenchen, *The Emergence of East Asian Constitutionalism*, 805-839.

[110] Gong Xiangrui, *Comparative Constitutional Law and Administrative Law*, (Beijing: Law Press. China 2003), 6-38; also see Zhang Zhiben, *A Study of Constitutionalism (reprinted edition of masterpiece of the legal textbook first published in the Republic of China before 1949)*, (Beijing: China Fangzheng Press 2004), 11-60.

[111] Chen Handa, 'Magna Carta and the British Constitution', *Nanjing University Law Review*, No.2 (2002), 18-33.

[112] Han Dayuan, 'A Study of the Chinese Constitution 1954', *Journal of Henan Administrative Institute of Politics and Law*, No.4 (2004), 1-14.

[113] Hu Jinguang & Han Dayuan, *Chinese Constitution* (second edition), (Beijing: Law Press. China 2007), 118.

[114] Han Dayuan, *Chinese Constitution 1954 and Constitutional Institutions (*Second Edition), (Wuhan: Wuhan University Press 2008), 138-142.

[115] He Qinhua, *Comparative Law in Modern China*, 127-139.

comparative approach.[116] This, to a degree, is regarded as providing some indispensable theoretical support for social transition in China[117].

Chinese social transition, triggered by the Reform and Opening-Up in 1978,[118] is regarded to have provided opportunities for the development of constitutional comparisons;[119] because changes resulting from the Reform and Opening-Up required referential experiences from foreign countries[120]. Most Chinese scholars hold that the Chinese social transition ranged over four dimensions[121]:

> (1) Changes from an agricultural society to an industrial and information society, from a planned economy to a market economy;
>
> (2) Changes from a dictatorial system to a democratic system, from the rule of man (through virtuous leaders) to the rule of law;
>
> (3) Changes from an acquaintance society to a rational society (or a stranger society); and
>
> (4) Changes from a rural society to an urban society, from a closed society to an open society.

Some scholars argue that Chinese social transition could be traced back as far as the Opium War in 1840, and fell into three stages: the initialization and slow development stage from 1840 to 1949, the moderate development stage from 1949 to 1978, and the accelerated development stage from 1978 to the present time.[122] Recently, the two viewpoints seem to be converged, since the

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[116] Han Dayuan, 'A Study of Chinese Constitutional Jurisprudence during Transitional Period (1982-2002)', *Jurist's Review*, No.6 (2002), 11-20.

[117] ibid

[118] Zheng Jiaming, 'Chinese Social Transition and the Changes of Values', *Journal of Tsinghua University (Philosophy and Social Science)*, No.1 (2010), 114-127.

[119] Zhu Jingwen, 'Reform and Opening-Up, and the Development of Comparative Law', *Jurist's Review*, No.4 (2001), 31-37.

[120] Deng Xiaoping, *Selected Works of Deng Xiaoping*, (Beijing: People's Publishing house 1993), 2.

[121] Yan Zhenshu, 'Interpretations of Basic Concepts in Chinese Social Transition', Journal of *Chongqing University of Posts and Telecommunications (Philosophy and social Sciences Edition)*, No.3 (2010), 6-10.

[122] Zheng Hangsheng (edited), *Chinese Society in Transition: From Traditional to Modern Society*, (Beijing: China Renmin University Press 1996), 23.

latter view recognises that real changes have only taken place since the Reform and Opening-Up.[123] During the transitional period, the introduction and development of a market economy may demand changes in the political system, because of the inconsistency between the economic development and the lagging political system, as mentioned in the section 1 of this chapter. The potential reforms in the political system will undoubtedly give rise to changes in power mechanisms; in terms of how to reform the Chinese power mechanisms, which is beyond Chinese local experience which has essentially been based on the tradition of the rule of man.

At the present time, comparative law has become an important subject[124] in most Chinese universities, and the comparative method is accepted by a majority of the Chinese scholars. For instance, China Law Society (*zhongguofaxuehui*, 中国法学会) set up a branch of comparative law in 1990, and more and more Chinese public lawyers, including Professor Han Dayuan (韩大元), Miao Lianying (苗连营), Lin Laifan (林来梵), Zhang Qianfan (张千帆), list comparative law as one of their research interests. The comparative work is largely represented by research into the system of judicial review, the German constitutional court and the French constitutional committee, and Chinese lawyers argue for the establishment of similar mechanism in the Chinese context.[125] Broadly speaking, the constitutional comparisons are less comparative, more introductory,[126] and the basic logic behind the comparisons may be deduced from the comparisons themselves: introducing foreign institutions, exploring the advantages of the institutions and suggesting China's drawing upon the institutions. In terms of comparisons

[123] Zheng Hangsheng, 'Differences between Chinese Transition and Western Transition', *People's Tribune*, No.5 (2009), 48.

[124] The leading textbooks in this field include: Gong Xiangrui, *Comparative Constitutional Law and Administrative Law*, (Beijing: Law Press. China 1985); Zhang Qianfa, *Comparative Law*, (Beijing: China Renmin University Press 2011); Wang Guanghui, *Comparative Law*, (Wuhan: Wuhan University Press 2010); Han Dayuan, *Comparative Law----- Constitutional Text and Interpretation*, (Beijing: China Renmin University Press 2008).

[125] Sun Feng argued that a Constitutional court should be introduced as the guardian angel of the Constitution 1982, see Sun Feng, 'A Guardian Angle of Chinese Constitution: To Establish a Constitutional Court in China', *Theory Research*, No. 32 (2011), 95-100. Professor Miao Lianying held that a constitutional committee, attached to the National People's Congress, should be set up to undertake the Chinese judicial review, see Miao Lianying, 'Tentative Plan on the Establishment of a Specific Body Undertaking the Constitutional Supervision', *Studies in Law and Business*, No.4 (1998), 3-9.

[126] Liu Yi, 'Research Paradigm should be established in Chinese Comparative Law', *Journal of Comparative Law*, No. 1 (2015), 128-139.

between China and Britain in the field of public law, comparative researches in the Chinese context are not too plenty.[127] *Comparative Administrative Law* by Professor Wang Mingyang (王名扬), which is well-known in the Chinese academic circle for its title of comparative law, introduces the administrative law in the United States, Britain and France, and concludes that the development of the Chinese legal system in administrative law should draw upon the Western experience.[128] Wang puts his focus on the *ultra vires* doctrine, the administrative tribunal, and the delegated legislation in Britain, and most of his account reflects the situations before the Second World War. As for the method of comparative public law, and how to draw upon the three countries in administrative law, Wang fails to involve. It should be noted that Wang was more than 80 years old when he wrote the book, which included very few references; so although the book is very famous in China, it may be less reliable as an academic resource. Another example is a famous Chinese journal article in the field of fiscal constitutionalism, entitled *To Construct a Budget State*[129] by Wang Shaoguang (王绍光). In this article, Wang argues that China should turn itself into a Budget State, whose basic feature lies in the representative supervision of fiscal power. Professor Wang takes the fiscal situation during the modernization period (between 1830s and 1890s) in England to exemplify his ideal model of representative supervision.[130]Wang's understanding of the financial situation in the modernization period and the role of the electorate in scrutinizing fiscal power in England is incorrect, and the points will be discussed in chapter 4. Similar to the *The Comparative Administrative Law* mentioned above, Wang does not touch upon the comparative method in his article. Besides, Dicey and his classic definition of the rule of law, as an important constitutional principle, are sometimes applied by Chinese lawyers in the discussion of the significance of the socialist rule of law, but the third meaning of the Diceyan version of the rule of law, the check on public power through judicial

[127] Li Xiaohui, 'A Study of the Judicial Application of Comparative Law', *Journal of the East China University of political Science and Law*, No.1 (2014), 86-101.
[128] Wang Mingyang, *Comparative Administrative Law*, (Beijing: Peking University Press 2006), 189.
[129] Wang Shaoguang, 'To Construct a Budget State', *Journal of Public Administration*, No.1 (2008), 6-42.
[130] ibid

mechanism, is always avoided, or interpreted as "the British constitution is the result of judicial judgement[131]".

Meanwhile, some scholars seem to pay attention to the method of comparative public law;[132] historical analysis[133], theoretical and practical analysis,[134] are proposed as the main methods. Besides, the infeasibility of legal transplant has been recognised by the Chinese lawyers,[135] and ideas about the "effective constitution" and the "Chinization of constitutional research" have been presented by some scholars. Professor Su Li (苏力) in 1995, proposed that the tradition and actuality of the Chinese legal culture should be taken seriously when exploring approaches to implementing the socialist rule of law,[136] for the distinctive social structure, political device and institutional logic of mainland China, which are named by Su as the "effective constitution", are determined by them.[137] Professor Han Dayuan (韩大元) advocated the "Chinization of constitutional research", and subtly emphasised the significance of integrating advanced systems from foreign legal families into the Chinese constitutional system.[138] According to Su and Han, Chinese legal studies should focus on Chinese issues, and which constitutional comparison should be served; in the meantime, the arguments of the two professors actually demonstrate the limitation of comparative research in the Chinese context. In other words, direct solutions may

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[131] Zheng Yongliu, 'The Origin and Vicissitude of the Rule of Law in England', *Tsinghua Forum of Rule of Law*, No. 12 (2002), 295-350.

[132] See Han Dayuan, 'An Examination of the Basic Issues in the Comparative Constitutional Law in the Contemporary Era', *Journal of Henan Administrative Institute of Politics and Law*, No.4 (2003), 6-18; Chen Yunsheng, 'Issues in the Comparative Constitutional Law', *Political Science and Law*, No.2 (1984), 34-38; Zhang Guangbo, 'A Study of the Target, Method, and Institutions in Comparative Constitutional Law', *Chinese Law Science*, No.3, (1987), 10-17; Dong Heping, 'The Purpose and Method of the Comparative Constitutional Law', *Journal of Northwest University of Politics and Law*, No.2 (1992), 12-16.

[133] Han Dayuan, 'An Examination of the Basic Issues in the Comparative Constitutional Law in the Contemporary Era', *Journal of Henan Administrative Institute of Politics and Law*, No.4 (2003), 6-18.

[134] Dong Heping, 'The Purpose and Method of the Comparative Constitutional Law', *Journal of Northwest University of Politics and Law*, No.2 (1992), 12-16.

[135] See Zhou Xuefei, 'Legal Transplant and the Chinese Traditional Legal Culture', *Legal System and Society*, No.13 (2013), 15-16; Su Li, *Rule of Law and Chinese Legal Resources*, (Beijing: China University of Political Science and Law Press 2004); Zhang Lihong, 'Target and Method of the Comparative Law', *Modern Law Science*, No.4 (2005), 12-19.

[136] Su Li, 'Reform, Rule of Law and Their Local Resources', *Peking University Law Journal*, No.5 (1995), 3-11.

[137] Su Li, 'Decentralisation in Contemporary China---re-studying *Ten Major Relationships* (the fifth section) by Zedong Mao(毛泽东)', *Social Sciences in China*,No.2 (2004), 42-55.

[138] Han Dayuan, 'Paradigm and Chinization of Constitutional Research', *Legal Science*, No.5 (2003), 9-11.

not be produced from the comparative work because of the distinctive social structure, political device and institutional logic in China. It should be noted that the expression of Chinization reveals a basic position of Chinese comparative law, that is, to draw upon useful experiences from Western countries in the settlement of some Chinese issues.

As for the practical function of constitutional comparisons, Professor Han Dayuan presented five points[139]:

> (1) It may influence the legislative work, especially amendments of the 1982 Chinese Constitution, and, as a case in point is the provision "the state values and safeguards human rights" inserted into the 1982 Chinese Constitution in 2004 as an amendment.
>
> (2) It may facilitate the academic community, including public lawyers and university students, to understand better some universal values of constitutionalism, and this may push the constitutional development of Chinese society.
>
> (3) It may help to evaluate the constitutional ideas provided by Chinese lawyers.
>
> (4) It may help the central government to produce proper foreign policies.
>
> (5) It may facilitate Chinese public lawyers to communicate and cooperate with foreign scholars.

At the same time, Professor Han noticed the function of comparative law in coordinating the relationship between the Constitution and the common citizen. He said that with the development of constitutional comparisons, more and more foreign constitutional theories have been introduced to China, and this may improve ordinary citizen's awareness of constitutionalism. When more and more Chinese people know their constitutional rights, and seek redress from the

[139] Han Dayuan, *Main Trend of Comparative Constitutional Law in Modern China*, (Beijing: China Renmin University Press 2005), 112-115.

constitutional systems, the Chinese paper Constitution may be activated.[140] Professor Deng Lianfan (邓联繁) stressed the function of constitutional comparisons in higher education. He said that the comparative constitutional law is an important subject in most Chinese universities, and the knowledge of foreign constitutional systems may have a far-reaching influence on the students: on the one hand, it will broader their vision of constitutional law; on the other hand, foreign theories may influence their future decisions as legislators, judges, or public servants.[141] However, it should be noted that constitutional comparisons cannot easily influence Chinese judicial decisions, as the interpretation of the Chinese Constitution and laws rests with the National People's Congress, and Chinese judges have no authority to interpret them at all.[142]

In terms of the constitutional comparison in this thesis, it is more comparative than introductory (or both comparative and introductory), and this may be an improvement, compared with the existing Chinese research productions in this field, which, as discussed in the above paragraph, are always introductory. Secondly, the specific method of constitutional comparison has already been clarified; in the Chinese context, the research method of legal comparison is seldom touched upon or simply referred to, as discussed in the above paragraph, and this may be another improvement or contribution. Besides, this thesis addresses the Chinese issues, and this means the thesis is a Chinese-issue-oriented research. According to the idea of "Chinization of constitutional research" provided by Professor Han Dayuan, this thesis may constitute a contribution to the "Chinization". It should be noted that because of the limitations of the comparative method, an immediate solution to Chinese issues will not be produced in chapter 6.

The influence of the constitutional comparison in this thesis should not be overestimated. In the first place, they are written in English, and will be inaccessible for some Chinese scholars and

[140] Han Dayuan & Hu Jinguang, *Chinese Constitution*, (Beijing: Law Press China 2004), 2.
[141] Deng Lianfan, 'New Idea on the Function of the Comparative Constitutional Law', *Journal of Hunan Agricultural University (Social Sciences)*, No.2, (2008), 89-92.
[142] Li Jianfeng, 'Comparative Law and the Chinese Judicial Practice', *Knowledge Economy*, No.6 (2014), 49-50.

governmental officials, due to the obstacle of language and the internet. Nevertheless, some public lawyers and university students, who are adept in English, will still read and comment upon them; the relatively authentic introduction, and the relatively objective appraisal of the exercise of fiscal power and the constitutional background in the two countries, will still have an influence on their understanding of the British constitutional rationales, for instance, the rule of law (as a constitutional principle), and the deep-rooted reasons for the Chinese issues. What is more, although the constitutional comparison in this thesis will not influence the Chinese judicial judgements, for the reasons presented in the previous paragraph, future judges who are now university students and read through this thesis, may be influenced. Finally, this thesis is written in English, and it may provide the British lawyers and students an opportunity to have a knowledge of the Chinese constitutional context.

1.3.3 The Explanation of My Historical Constitutional Reflective Comparison.

As mentioned previously, this thesis aims to assess and analyze the questionable fiscal relations between the Chinese central and local governments through a historical constitutional reflective comparison. The present section will focus on the reasons for the choice of research method, that is, why this specific method is adopted, and why comparisons are made between mainland China and England (rather than UK).

As noted in 1.3.3, Chinese tradition did not furnish academic research with enough theoretical and practical experience in the field of constitutional law, and constitutional comparisons have contributed greatly to the enactment of successive constitutions since the end of Qing Dynasty and to the constitutional studies in the modern time. In terms of issues resulting from the questionable relationship between central and local governments in mainland China, Chinese scholars are exploring the issues from two perspectives: “centralisation-----decentralisation”, or

legalization (see Pages 3-4). Both approaches fail to provide a solution to prevailing problems. In this sense, the comparative approach may be a necessary road to a deeper understanding and illustration of relevant issues, and this is the main reason for the adoption of a comparative approach. That is to say, the research purpose requires that constitutional comparison provides an illustration from England to highlight a possible response to Chinese issues, i.e. comparing with and learning from England, without necessarily suggesting the straightforward adoption of such solutions, given the difficulties of "legal transplant" across very different constitutional and legal cultures. In this sense, the reflective comparison is like "looking through the eyes of foreign law[143]", the process of which is to "enable us better to understand our own"[144].

Based on the research purpose, the focus of the comparisons, as discussed in 1.3.2, will be on the differences in the exercise of fiscal power in local government and the constitutional context of the power mechanisms in China and England. This does not mean similarities will be neglected, for they provide the potential or prerequisite for comparisons by revealing commonality of problems and drawing comparative reflections. The similarities have been presented in the section 1.3.2, and the substantial differences between the two countries may include three points (which will be discussed in detail in chapter 5).

1. Different development trends of local government finance. In mainland China, local government are expanding fiscal resources in the form of land finance, and the fiscal expansion brings about more and more social problems (will be discussed in chapter 2). In England, the fiscal power enjoyed by local authorities is exercised within a set of accountability mechanisms, and local government have no room to expand their fiscal resources (will be discussed in chapter 4).

2. Different power principles in local finance. Chinese local government is operated in the light of the socialist rule of law, and the rationale of this

[143] Mathias Reimann and Reingard Zimmermann (Edited), *The Oxford Handbook of Comparative Law*, 342.
[144] ibid

unique principle highlights the control of the CCP over the political process. By contrast, in England, state power is submitted to the rule of law, an important constitutional principle, which emphasises the legitimacy of public power, and the answerability of the decision-making in the exercise of public power: on the one hand, power should be authorised by Parliamentary statutes; on the other hand, the power process should be open to challenge by judicial procedures.

3. Different practical results of power mechanisms. Under the socialist rule of law and the system of People's Congress in the Chinese context, state organs, whether at central or local levels, are all dominated by the party committees of the CCP, and this leads to a failure of accountability mechanisms. As a result, no limitation can be imposed upon local government (theory and reality of the Chinese power mechanism will be discussed in chapters 2 and 3). Within the frame circumscribed by the constitutional principles, the rule of law and the separation of powers (the check of powers may be more suitable), local finance in England is restricted by a set of accountability mechanisms, which, in a sense, ensure that local finance develops in an orderly manner, and local government are accountable for their fiscal decisions.

As for why the legal system in England, rather than that in UK, is chosen as a comparator, the reasons may be presented as follows. In the first place, there is no universally applicable principle in the selection of legal system for comparisons, and it has been argued that the selection depends largely on the comparatist's primary purpose, or even personal preference.[145] In terms of the research purpose, this thesis purposes to deal with particular Chinese issues, and the commonality of problems between England and China, being briefly presented in 1.3.2, plays a decisive role. In terms of personal preference, England is the birthplace of modern constitution and the constitutional principle---the rule of law, so the exploration of power mechanisms in England is extremely attractive to a foreign scholar from a country with a tradition of despotic government and the rule of man. Secondly, England is the biggest country within UK in terms of population,

[145] W. J. Kamba, *Comparative Law: a Theoretical Framework*, 485-519.

area, economy and local government expenditure,[146] this may imply some representativeness, as far as the constitutional comparisons are concerned. Besides, it is manageable for a PhD thesis, written in a second language, to make comparisons between China and England, due to the complicacy of the UK governmental and legal system, especially after the enactment of the devolution statutes-----the Northern Ireland Act 1998, the Government of Wales Act 2006, and the Scotland Act 1998. This does not mean Northern Ireland, Wales and Scotland are totally excluded from the scope of relevant research in terms of constitutional comparisons, on the contrary, the three countries are the first part of researches after this thesis. In addition, the UK saw a process of incorporation and devolution since May 1707[147], and England is the only country which enjoy a historical continuality in respect of governmental structure and a constitutional system. This, at least in a degree, resembles mainland China whose tradition has continued without a substantial break since the establishment of Qin Dynasty in 221 B.C,[148] and provides some comparability of the problems in question. In general this thesis covers relevant matters and events only up to November 2015, though very brief comments have been added on one or two particularly significant matters which occurred between that date and April 2016 such as the Cities and Local Government Devolution Act 2016, which received Royal Assent and passed into UK law on 28 January 2016.

Methodological difficulties should be pointed out, and the first one lies in the different way of thinking in the two countries. Chinese people are not good at critical thinking, because of the long-term influence of the Confucian tradition, which stresses passive obedience to an authority, including elder brother, father, superior and emperor.[149] As a result, Chinese scholars tend to

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[146] See Region and Country Profiles, Key Statistics and Profiles, October 2013 (online), http://www.ons.gov.uk/ons/rel/regional-trends/region-and-country-profiles/region-and-country-profiles---key-statistics-and-profiles--october-2013/index.html (accessed on 08-10-2015).

[147] David Feldman QC, FBA & Andrew Burrows QC, *FBA, English Public Law*, (Oxford: Oxford University Press 2009), 9-13.

[148] Guo Chengwei & Ma Zhigang, 'Historical Circumstance and Modern Legal System: Response of China', *Tribune of Political Science and Law*, No.5 (2000), 16-29.

[149] Yang Chaoming & Song Lilin, *An Explanation of the Confucian Ideas*, (Jinan: Shandong Publishing Group 2009), 36.

praise, rather than criticise, the Chinese legal system. Even if there is criticism, the focus will never be put on the authority of the Chinese Communist Party. Therefore, it is very difficult to collect appropriate material for the exploration of the reality of Chinese power mechanisms in chapter 3. The second difficulty is related to legal translation. The thesis is undertaken in a second language, and academic opinions, constitutional theory and practice, which were originally in Chinese, had to be translated into English. In the process, not all Chinese words could be translated directly into English and retain their meaning. For instance, "拆迁 (*chaiqian*)" (referred to in 1.2.2) is a peculiar phenomenon in mainland China, and no corresponding word could be found in English. The thesis translates "拆迁" into "forced eviction", but the arbitrary power behind the Chinese word "拆迁" might not be translated thoroughly. Meantime, there is no officially recognised English versions of the 1982 Chinese Constitution, and the laws by the National People's Congress. Against this backdrop, an authoritative website *Chinalawinfo.com*, established by Peking University, is employed as a reference, and the basic principle of legal translation, the literal translation, is also taken into account. Literal translation is advocated as the golden rule even today,[150] and it means the translated version should be faithful to the source text.[151] The main reason for the adoption of the literal principle lies in the fact that there are no explanatory notes on the legislative purpose, or the causes for some provisions, so the only foundation for legal translation is the text of the laws. In addition, the "unwritten" constitution in England consists of constitutional law, constitutional conventions, case law and even laws from the EU, which may pose some handicaps for a foreign comparatist in the collection of research materials.

[150] Susan Sarcevic, *New Approach to Legal Translation*, (Netherlands: Kluwer Law International 1997), 16.
[151] Malcolm Harvey, 'What's so special about the Legal Translation', *Translator's Journal*, Vol. 47, No. 2(2002), 177-185.

1.4 Outline of the Research Structure.

This thesis is structured as follows: Chapter 1, the introduction, raises Chinese issues stemming from the "fiscal game" between central and local governments, and elucidates the research method----a historical reflective comparison between mainland China and England from a perspective of constitutional law. Chapters 2, 3, 4 and 5 contain analyses of Chinese issues from various dimensions, including the English illustration through a comparative reflection. Chapter 6, the Conclusion, will present some thoughts on the future prospects of Chinese issues based on the previous analyses.

To be specific, chapter 2 will explore fiscal relations between central and local governments in the Chinese context theoretically and practically, and the underlying mechanism of power operation will be examined as a cardinal line. The thread comprising "fiscal game between central-local governments----fiscal expansion of local government----unconstrained power in local finance" will be identified in the chapter. Chapter 3 makes a deeper investigation into the operation of fiscal power in local government, and Chinese power practice is presented generally and specifically. The real power mechanism underpinning the fiscal expansion in local government, or the route which leads to the absence of constraint on fiscal power in local government, will be examined in this chapter. Chapter 4 examines local finance in England from a perspective of tradition and actuality, and the power mechanism, especially how local government is made accountable for their fiscal decisions, is the main concern, given the illustration of Chinese issues. Chapter 5 offers reflective comparisons based on the Chinese report and the English report, of course, with the intention of illustrating and analysing the Chinese issues. Chapter 6 is the conclusion of the thesis, which, drawing on the comparative reflections undertaken in chapter 5, and offers some suggestions relating to a proposed way forward for the Chinese issues, and some possible directions for the Chinese "constitutional moment" are also presented.

Chapter 2: Theory and Reality of Fiscal Power in Chinese Local Government.

2.1 Introduction.

The purpose of this chapter is to examine the constitutional context and the *status quo* of Chinese issues related to fiscal power in local government. Chapter one suggested that Chinese local government are fiercely expanding their fiscal sources in the name of land finance, and in the process, many social problems, including the infringement of human rights, have become victims. It seems that Chinese local government are exercising their fiscal power without accountability.

According to Richard Mulgan, accountability is a complex term, which has been frequently used during recent decades in the field of public administration with an ever-expanding concept.[152] Although the meanings of "accountability" saw a chameleon-like change, one of its meaning, i.e. that of being able to account for one's actions, is still pertinent as a core sense;[153] in this case, accountability may be seen as an institutional arrangement in which an actor can be held to account by a forum.[154] Adam Tomkins divides accountability mechanisms into three forms, including political mechanism, legal mechanism and other mechanism,[155] and those mechanisms may play a role in checking the abuse of powers.[156] These arguments provide a perspective in the exploration of the exercise of powers, and this is the perspective adopted by this thesis in the exploration of Chinese issues related to local government finance. As mentioned in chapter one, the causal factors of Chinese issues are regarded as being rooted in "revenue-centralizing and

[152] Richard Mulgan, 'Accountability: An Ever-Expanding Concept', *Public Administration*, Vol. 78 (2000), 555-573.
[153] G. W. Jones, *The Search for Local Accountability*, in Steve Leach (edited), *Strengthening Local Government in the 1990s*, (London: Longman 1992), 49-78.
[154] Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', *Western European Politics*, Vol.33 (2010), 946-967.
[155] Paul Craig & Adam Tomkins (edited), *The Executive and Public Law, Power and Accountability in Comparative Perspective*, (Oxford: Oxford University Press 2006), 37-50.
[156] Ruth W. Grant & Robert O. Keohane, 'Accountability and Abuse of Power in World Politics', *American Political Science Review*, Vol.99 (2005), 29-43.

expenditure-decentralizing", stemming from the revenue-sharing scheme[157], and this is a conventional approach employed by the majority of Chinese scholars in the exploration of fiscal relations between central and local governments. Should the revenue-sharing scheme absorb all the blame *vis-a-vis* the uncurbed power in local finance, and what really is at the core of the Chinese issues? This chapter aims to addressing these questions through the exploration of the accountability mechanisms.

First to be explored are Chinese theories, including the general theories on power mechanisms and the specific theories on fiscal power in local government, and this will be followed by the rudimentary accountability mechanisms in the light of the 1982 Constitution of the People's Republic of China. The exercise of fiscal power in local government follows certain theories, and this exploration starts by reflecting on the financial situation in mainland China. Arising from this exploration, it becomes possible to conclude that Chinese local government are arbitrarily expanding their fiscal resources in the name of land finance. This seemingly results from the fiscal difficulties in the light of the revenue-sharing scheme. In terms of the accountability mechanisms, there is a discrepancy between Chinese constitutional theory and the operation of the mechanisms written in the 1982 Chinese Constitution, and the arbitrariness of the fiscal power of Chinese local government, which may be a consequence of the contradiction, rather than that of the revenue-sharing scheme.

2.2 Chinese Theories: Rudimentary Accountability Mechanisms.

From a legal point of view, the question of how to deal with fiscal relations between central and local governments involves in the overall constitutional system of a particular country, for

[157] Li Weiguang, 'Balancing Fiscal power and Administrative Responsibility Plays a Key Role in the Perfection of Revenue-Sharing Scheme', *Taxation Research*, No.4 (2008), 15-17.

"budget is the skeleton of the state stripped of all misleading ideologies"[158]. Thus, the scope of Chinese theories in this chapter, necessarily include some general theories on the mechanics of power, and some specific theories on the exercise of fiscal power in local government. The theories may present a broader institutional backdrop for Chinese issues in question.

2.2.1 The System of the People's Congress: A Democratic Accountability Mechanism in Theory?

The system of the People's Congress(*renmindaibiaodahuizhidu*, 人民代表大会制度) is said , in theory, to be the fundamental political system in mainland China. According to the 1982 Chinese Constitution, this means that:

> (1) Chinese power belongs to the people, and the people exercise power through their representatives in the National People's Congress (NPC) and local People's Congress at various levels[159].
>
> (2) The NPC and local People's Congress at various levels should be constituted through democratic elections, responsible to the people and subject to the people's supervision[160].
>
> (3) People's Congress at various levels elect and oversee other state organs at the same level[161], and the administrative and judicial branches should be derived from, and responsible for the People's Congress of various levels. Local People's Congress shoulder the responsibility of ensuring the observance and implementation of the 1982 Chinese Constitution in their jurisdictions, that is to say, laws and by-laws enacted by local government should not contradict the 1982 Chinese Constitution and basic laws made by the NPC[162].

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[158] This wording was presented by Joseph Schumpeter in *The Crisis of Tax State* in 1918, cited from Mike Moore, 'Revenues, State Formation, and the Quality of Governance in Developing Countries', *International Political Science Review*, Vol. 25, No.3 (2004), 297-319.

[159] See the article 2 of the 1982 Chinese Constitution.

[160] See the paragraph 2, article 3 of the 1982 Chinese Constitution.

[161] See the paragraph 3, article 2 of the 1982 Chinese Constitution.

[162] Cheng Xiangqing, 'The Status and Functions of the System of People's Congress in the Construction of Socialist Harmonious Society', *Journal of Beijing Union University (Humanities and Social Sciences)*, No.1 (2006), 7-13.

(4) The NPC, the supreme state organ in mainland China, enjoys supreme legislative power and the power to amend and interpret basic laws enacted by the NPC itself[163].

The focus of this chapter is the power mechanisms, and the system of the People's Congress establishes the rough outline of fundamental power mechanisms in theory: (1) the people *elect* People's Congress, and the People's Congress *elect* the administrative and judicial branches. In this sense, the system of the People's Congress is argued to be a democratic mechanism[164] through which Chinese people govern national affairs, and become the masters of the country[165], or the Chinese people decide to exercise state powers. (2) The fusion of state power, means that the administrative and judicial branches are generated by, and responsible for the People's Congress, which theoretically exercises power on behalf of Chinese people. In the Chinese context, the fusion of state powers is officially named after the "System of People's Congress", which is regarded as the symbol of the popular superiority in Chinese power process[166]. In theory, the "fusion" means the legislative power, the administrative power and the judicial are all enjoyed by Chinese people; the People's Congress, the administrative branch and the judicial branch exercise merely the legislative, administrative and judicial functions authorized by Chinese people, rather than powers[167]. In terms of the relationship between the legislative, administrative and judicial branch, the "fusion" means the opposite of the separation of powers, which is always regarded as being the heritage of Western constitutionalism.[168] The People's Congress is said to stand for the people, implying the unification of people's powers[169], whereas the separation of

[163] In the Chinese context, the NPC is responsible for the enactment of basic laws, ranging over the criminal laws, civil laws, financial laws, and laws regulating the state organs.

[164] Yang Guanbin & Yin Donghua, 'A Study of the Democratic Foundation of the System of People's Congress', *Journal of Renmin University of China*, No. 6(2008), 41-47.

[165] Cai Dingjian, 'A Study of the Reform and Perfection of the System of People's Congress', *The Political Science and Law Tribune*, No. 6 (2004), 7-17.

[166]Xiu Shi, 'Why the System of People's Congress, rather than the Separation of Power, should be upheld in China', *Ji Lin Ren Da*, No.7 (2009), 18-19.

[167] Yin Shuangpin, 'A Study of the Superiority of the System of People's Congress', *Chinese Journal of Law*, No.5 (1989), 11-17.

[168] Cheng Naisheng, 'A Criticism on the Doctrine of the Separation of Powers', *Jin Ling Law Review*, No. 2 (2008), 13-21.

[169] Lin Bohai, 'Chinese Logic on upholding the System of the People's Congress', *Studies in Ideological Education*, No.3 (2009), 11-15.

powers is regarded as being a destruction of people's power[170]. As far as supervision and accountability is concerned the administrative and judicial branches report to the People's Congress annually[171]; People's Congress nominates the head of administrative and judicial bodies[172], and repeals the administrative regulations and by-laws by administrative branches[173]. However, there is no provision about how to deal with relations between the administrative and judicial branches of government, and such relations are assumed in theory to be very harmonious, for the power is theoretically exercised on behalf of the people, and is loyal to people's interests[174].

The system of People's Congress is claimed to be the optimum democratic form in mainland China[175]; most Chinese scholars argue that Chinese political civilization, founded on the system of People's Congress[176], should be upheld in the foreseeable future[177]. However, the 1982 Chinese Constitution does not provide detailed information about how the people ***elect*** the People's Congress, and some general terms, i.e. "participate the management of state affairs and social affairs", are always used to represent the elective franchise, which should be enjoyed by Chinese people.[178] In the meantime, there is no provision about how to deal with potential unlawfulness of the administrative branch, or relations between the administrative and judicial branches. Against the lack of clear definitions of some key terms and concepts, such as 'elect', 'supervise', 'report the work', etc. the processes through which the state organs are answerable to the People's Congress, become complicated and impracticable. In fact, the People's Congress

[170] Rong Shixing, 'A Study of the Separation of Power and the System of the People's Congress', *Journal of the Central University for Nationalities*, No.6 (2004), 11-17.
[171] See the Article 92 and 110 of the 1982 Chinese Constitution.
[172] See the Article 63 and 101 of the 1982 Chinese Constitution.
[173] See the Article 67 and 104 of the 1982 Chinese Constitution.
[174] Yu Ziqing, 'A Study of the Constitutional Principle "All Power in China should belong to the People"', *Political Science and Law*, No. 6(2002), 5-11.
[175] Fang Hongwei & Lu Zhengtao, 'The System of People's Congress: The Best and Supreme Democratic Form', *Journal of Guizhou University (Social Science)*, No.1 (2005), 26-29.
[176] Cheng Xiangqin, 'The Political Civilization and the System of People's Congress', *Journal of Peking University (Humanities and Social Sciences)*, No. 6 (2004), 53-59.
[177] Liu Zheng & Cheng Xiangqin, 'To uphold and Perfect the System of People's Congress', *Zhong Guo Ren Da*, No.18 (1998), 12-14.
[178] Zhu Kongwu, 'A Study of the Legal Systems on the Local Participation in the decision-Making of the Central Government', *Legal Forum*, No.2 (2009), 52-58.

is absolutely controlled by the Chinese Communist Party through various methods, therefore the system of People's Congress is only a formal or paper system[179]. The actual effect of this system, especially in local finance, will be presented later in this chapter, and further discussed in chapter 3. At the same time, this is a good point for the constitutional comparisons to be made between mainland China and England in chapter 5, for state powers in the English context are also operated on a fusion of powers, but the two types of fusion are so different that they will be explored as differences rather than similarities.

2.2.2 The Socialist Rule of Law: Rule of Law, or Rule of Political Party?

The socialist rule of law, which is always abbreviated to the rule of law in the Chinese context, is stated in the 1982 Chinese Constitution, as being "governing the country by law and constructing a socialist country under the rule of law". The principle, written into the 1982 Chinese Constitution as part of the 1999 amendment, is regarded as a milestone in the road to a "prosperous and strong, democratic and civilized modern country.[180] The high praise does not necessarily mean high rationality of the power mechanism in the light of the socialist rule of law. In fact, the 1982 Chinese Constitution fails to provide an elaboration of this important wording, and no definition can be found in Chinese law. Thus, this highly recognized constitutional theory seems merely a vague and vacuous provision, full of uncertainty, for its meanings are changing all the time. From a practical observation, the Chinese Communist Party seems to control the interpretation of this principle, and different General Secretaries of the CCP provide different versions of this constitutional principle. Strictly speaking, the meaning provided by a political party should not be included in Chinese theories, for they are not written in the Chinese Constitution. However, mainland China is controlled by the Chinese Communist Party, and the

[179] Liu Qiyun, 'Issues on the Perfection of the System of People's Congress', *Scientific Socialism*, No.6 (2006), 25-29.
[180] See the Preface of the Chinese Constitution 1982.

socialist rule of law controls Chinese power practice. Thus, the meanings are explored in this chapter as part of the Chinese theories.

During the period between the 1950's and 1978, the socialist rule of law was an equivalent to the socialist legal *system*, and relevant reasons for this may be listed as follows: first, the *socialist rule of law* and the *socialist legal system* share the same pronunciation in Chinese, and translators might mix them up when they translated relevant works by Karl Marx.[181] Besides, a sound *socialist legal system* was indeed the primary understanding ("misunderstanding" may be better), or expectation for the *socialist rule of law* after a long-term *rule of man,* especially during the cultural revolution between 1966 and 1976[182]. What is more, there is a concern that the *rule of law* may negate the leadership of the Chinese Communist Party, thus, *legal system* may be more acceptable than *the rule of law* in the Chinese context. [183] Legal nihilism prevailed in mainland China before the Reform and Opening-Up[184], and the then legislative work was stagnated; as a result, the Chinese Constitutions of 1954, 1975 and 1978, were completely taken over by the policies of the Chinese Communist Party.[185] Chinese society was under the *rule of man* at that period of time, and the manifestation was argued to include bureaucracy, excessive centralization, patriarchy, life tenure at leading posts, and multiform privilege[186].

In the Third Plenary Session of the 11th Central Committee of the Chinese Communist Party(*shiyijiesanzhongquanhui*, 中国共产党十一届三中全会) in 1978, Deng Xiaoping

[181] Sun Guonhua, 'The Concepts of Legal System and Rule of Law should not be mixed up', *Chinese Legal Science*, No.3 (1993), 45-48.
[182]Zhang Jincai, 'A Study of the Recovery and Development of Socialist Legal System', *Chongqing Administration*, No.4 (2009), 102-105.
[183] Li Buyun & Chen Guimin, 'Differences between Rule of Law and Legal System', *Ren Da Gong Zuo Tong Xun*, No.8 (1998), 18-21.
[184] Wang Zhenmin & Li Zhenhui, 'From Legal Nihilism to the Rule of Law: Achievements of the Third Plenary Session of the 11th Central Committee of the Chinese Communist Party', *Journal of Tsinghua University (Philosophy and Social Sciences)*, No.4 (1998), 29-34.
[185] Lin Jingren, 'A Study of Relations between Policies of the Chinese Communist Party and Laws', *Chinese Journal of Law*, No. 4 (1980), 47-49.
[186] Lv Shilun & Zhang Xuechao, 'The Interpretation of Deng Xiaoping's theory on the Socialist Rule of Law with Chinese Characteristics', *Northern Legal Science*, No. 6 (2008), 7-17.

presented some guiding principles for the *socialist legal system* (or *the socialist rule of law*): (1) laws must be enacted;(2) once a law is put into force, it should be strictly observed;(3) a lawbreaker must be prosecuted. After Deng's official interpretation, the Chinese scholars began to discuss the meanings of the *socialist rule of law* in public. The first journal article The *Rule of Law or The Rule of Man* by Wang Liming (王礼明), was published in *Renmin Daily* (人民日报)on the 26th January 1979; another representative journal article by Li Buyun (李步云), *The Socialist Rule of Law should be Carried Out*, was published on the 12th December 1979. However, the articles shared the same premise that the *socialist rule of law* must stress the centrality of the CCP[187].

There was a debate about a *socialist country with the socialist legal system*, or a *socialist country with the socialist rule of law* in 1990s. Li Buyun, the then famous professor, argued that the significance of exploring the differences between the two wordings, *the socialist legal system* and *the socialist rule of law*, was that, the socialist legal system only meant the enactment of laws, and to enact laws did not mean the implementation of enacted law; thus, the *socialist rule of law* was a much better expression than the *socialist legal system*[188]. The third generation of the collective leadership of the Chinese Communist Party[189] , which was centered on Jiang Zemin (江泽民), adopted viewpoints from academic circles, and turned the official expression of a socialist country with *socialist legal system* into a socialist country with *the socialist rule of law*[190], and this was proclaimed as a marvellous undertaking by the Chinese Communist Party.[191]

The *socialist rule of law* was announced, in 1995, to be the orientation and basic mission of the Chinese people in the 15th National Congress of the Chinese Communist Party, and the official

[187] Li Buyun & Li qing, 'From Legal System to the Rule of Law: Some Important Issues during the Latest Twenty Years', *Law Science*, No.7 (1999), 1-4.
[188] Sun Guonhua, The *Concepts of Legal System*, 45-48.
[189] The first generation is centred on Zedong Mao, the second generation is on Deng Xiaoping.
[190] Sun Guonhua, The *Concepts of Legal System*, 45-48.
[191] Sun Guonhua, The *Concepts of Legal System*, 45-48.

meanings included four points: (1) democracy, (2) human rights, (3) the supremacy of law, and (4) judicial independence and judicial justice[192]. In 2006, the definition of the *socialist rule of law* was re-stated by the Politics and Law Committee of the Central Committee of the Chinese Communist Party (*zhonggongzhongyangzhengfawei*, 中共中央政法委) as follows:

> *(1) Governing the country by law,*
>
> *(2) Enforcing the law for the sake of the people,*
>
> *(3) Fairness and justice,*
>
> *(4) Serving the overall interests of the people, and*
>
> *(5) The dominance of the Chinese Communist Party[193].*

Of the five points, the fifth, the centrality of the Chinese Communist Party in leading the country, is argued to be the soul of the socialist rule of law[194], and this is also regarded as being the main differences between the *socialist rule of law* and the *rule of law* in Western countries[195]. Tong Zhiwei (童之伟), a public lawyer said although the five points of the *socialist rule of law* are correct judgments on the Chinese political situation, it does not imply that the five points are accurate and suitable formulation of the *socialist rule of law*. Tong presented six points, including:

> *(1) Governing the country by law,*
>
> *(2) Fairness and justice,*
>
> *(3) Developing democracy,*
>
> *(4) Safeguarding human rights,*
>
> *(5) The supremacy of the Chinese Constitution 1982, and*
>
> *(6) The dominance of the Chinese Communist Party[196].*

Obviously, there is no substantial difference between the viewpoint of Tong and that of the Chinese Communist Party. The Chinese Communist Party have even initiated, since 2006, an

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[192] Ma Jianxin, 'Historical Process of the Construction of the Rule of Law in China', *Western Law Review*, No. 4 (2011), 17-22.

[193] The Central Committee of Politics and Law of the CCP, *The Explanation of the Socialist Rule of Law*, (Beijing: Changan Publishing House 2006), 11.

[194] Jiang Wei, 'The Rule of Law with Chinese Characteristic', *People's Procuratoial Semimonthly*, No.7 (2008), 7-14.

[195] Zhang Wenxian, 'An Introduction to the Socialist Rule of Law', *Jurists Review*, No. 5 (2006), 10-20.

[196] Tong Zhiwei, 'A Study of the Meanings of the Socialist Rule of Law', *Legal Science*, No. 1 (2011), 17-24.

unremitting campaign to advertise and practise the *socialist rule of law* in Chinese society, especially in universities, courts and procuratorial organs, in order that higher education and judicial works should be in the command of the *socialist rule of law*. After Xi Jinping (习近平) took office, in 2012, as the General Secretary of the Central Committee of the CCP, the official meanings of the socialist rule of law were re-interpreted[197]:

> *(1) The leadership of the Chinese Communist Party should be upheld,*
>
> *(2) The principle position of the Chinese people should be protected,*
>
> *(3) The principle that all the people are equal before the law should be safeguarded,*
>
> *(4) The rule of law should be combined with the rule of virtue[198], and*
>
> *(5) The Chinese specific political situation should be taken seriously. Xi stressed even more the leadership of the Chinese Communist Party, and made the point the first meaning of the socialist rule of law.*

Overall, China being led by the Chinese Communist Party, is at the core of any version of the *socialist rule of law*, no matter whether it is political or academic. It is the Chinese Communist Party that promotes the re-elaboration of the meanings over and over again, and the word "*socialist"*, in a sense, is just a rhetorical device or an alternative for the notion of "the Chinese Communist Party leading the Country". However, there is an obvious paradox in the integration of "*the socialist*" with "*the rule of law*", if viewed through the lens of Western concept of the rule of law. The term "socialist" is designed to emphasize the supremacy of the Chinese Communist Party in political life, and the rule of law, as one of the constitutional principles, means, according to Dicey, the legitimate authorization of power by Parliament; the equality of all bodies before the Parliament statutes, no matter whether they are public bodies or private

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[197] Xi Jinping, 'Accelerating the Establishment of the Socialist Rule of Law in China', *Qiu Shi*, No.1 (2015), 1-6.

[198] In the Chinese context, the rule of virtue is regarded as being the helpful complement of the socialist rule of law. The former stresses the effect of social morality, and the latter underlines the supremacy of the Chinese Communist Party. The mainstream culture in the Chinese context is the Confucian culture, standing for the passive obedience to higher authorities. Thus, the rule of virtue and the socialist rule of law could be easily combined in the political life, and they jointly serve for the absolute control of the Chinese Communist Party over the Chinese power process. See Li Lin, 'A Study of the Rule of Law and the Rule of Virtue', *Journal of Harbin Institute of Technology (Social Sciences Edition)*, No.1 (2013), 76-79.

bodies; and the justiciability of the exercise of power. (These meanings will be explored in chapter 4). Thus, "*socialist*" and "*the rule of law"*, seem to be totally unrelated rationales. If they are mentioned in the same breath, there is no doubt that the "rule of law" is a mere figurehead for emphasizing the leadership of the Chinese Communist Party. How the Chinese ruling political party controls the power in practice will be discussed in Chapter Three. The Chinese constitutional principle, and the socialist rule of law, provides a good opportunity for the constitutional comparisons between the socialist rule of law and the constitutional principle in the English context, which will be discussed in in chapter 5.

2.2.3 Implementation Mechanism: Judicial Review, Constitutional Supervision, or Academic Hypothesis?

This chapter, so far, has noted that the People's Congress, and the socialist rule of law, fundamental principles that are considered as being a vivid representation of Chinese characteristics,[199] seems like a proclamation of popular sovereignty.[200] However, the declaration of some guiding principles of a Constitution or constitutional law does not necessarily lead to the enforcement of those principles. In this sense, the implementation mechanism of the 1982 Chinese Constitution should not be overlooked when discussing the constitutional backdrop in respect of accountability mechanisms. Generally speaking, the term implementation mechanism simply means the way in which the Chinese Constitution is implemented in practice, for example it indicates what individuals can do to safeguard their human rights under the Chinese Constitution if they consider their rights have been infringed by legislation or by a public body. Alternatively, when a public body or organization oversteps its authority the mechanism is there to show how to cope with the public body or organization, based on the terms of the Chinese Constitution. The present General Secretary of the Chinese Communist Party, Xi Jinping(习近

[199] Zhang Wenxian, 'An Introduction to the Socialist Rule of Law'*, Jurists Review*, No. 5 (2006), 10-20.
[200] Hu Jinguang & Han Dayuan, *The Chinese Constitution*, (Beijing: Law Press China 2008), 116.

平), reaffirmed that the life-force of the Chinese Constitution rests with its practical effectiveness, when addressing on the 30th Anniversary commemorating the promulgation of the Chinese Constitution 1982 on 4th December 2012[201].

In fact, the question of how to guarantee the effectiveness of the 1982 Chinese Constitution has been a much-talked-about topic in Chinese academic circle.[202] The Constitution does not define the implementation mechanism, and how to describe the mechanism has been a continuous perplexity for Chinese scholars. According to Professor Hu Jinguang(胡锦光), various concepts, such as judicial review(*sifashencha*, 司法审查), constitutional review(*weixianshencha*, 违宪审查), the implementation of constitution(*xianfadeshishi*, 宪法实施), the application of constitution(*xianfashiyong*, 宪法适用), the security mechanism of the implementation of constitution(*xianfashishibaozhangjizhi*, 宪法实施保障机制), constitutional supervision(*xianfajiandu*, 宪法监督) and the judicialization of constitution (*xianfade sifahua*, 宪法的司法化), are concurrently used in the academic discourse to refer to the significant, undefined institutional device in mainland China.[203] Professor Hu even presented some differences and similarities among the concepts in his article, but these are obviously beyond the remit of this section, which rests with the exploration of how to implement an accountability mechanism promised by the 1982 Constitution.

The 1982 Constitution does not include a definite mechanism which may put the constitutional theory into effect, but the wording of the implementation of the Constitution is mentioned three times. The first mention appears in the last paragraph of the preface, proclaiming that the Constitution is the most fundamental law with the supreme legal effect in China, and all the

[201] Xi Jinping, 'The Speech on the 30th Anniversary of the Enactment of the Chinese Constitution 1982', *Renmin Daily*, 12-05-2012.
[202] Ma Ling, 'Some Reflections on the Debate of the Constitutional Review', *Juridical Science Journal*, No.3 (2006), 16-17.
[203] Hu Jinguang, 'A Study of the Constitutional Review and Related Concepts', *Law Science Magazine*, No.4 (2006), 22-31.

people, state organs, armed forces, political parties, etc. should be responsible for the implementation of the Constitution[204]; the second mention is Article 62, which sets out 15 functions of the National People's Congress, including supervising the implementation of the Constitution[205]; the third one is Article 67, setting out 21 functions of the standing committee of NPC, amongst which is interpreting the Constitution and supervising the implementation of the Constitution.[206] Although detailed approaches about how to safeguard the implementation of the Constitution is not specifically formulated, the three parts are frequently quoted as theoretical foundation to each conceptual instruments mentioned in the above paragraph, and two typical views of them are examined as follows.

Professor Wang Zhenmin (王振民) held that the 1982 Constitution introduced a special mechanism called constitutional review, and the mechanism was perfected in 2000, with the enactment of the Legislation Law (*lifafa*, 立法法)[207]. Reasons for this include: (1) the Legislation Law, "law of laws[208]", sets up an elementary mechanism to deal with potential inconsistencies between legislations, by providing a hierarchy of legislations enacted by different bodies[209]; (2) the Legislation Law authorises an individual to submit a written proposal to the standing committee of NPC to examine whether an administrative law or local law conflicts with the Constitution[210]. These factors are regarded as being a paving-stone to a country governed by the rule of law[211].

According to Professor Wang, the constitutional review is mainly exercised by the NPC and its standing committee, and the local People's Congress and its standing committee perform some

[204] See the preface of the 1982 Chinese Constitution.
[205] See the article 62 of the 1982 Chinese Constitution.
[206] See the article 67 of the 1982 Chinese Constitution.
[207] Wang Zhenmin, 'A Study of the Subject and Procedure of the Chinese Constitutional Review', *China Law*, No. 1 (2006), 13-15.
[208] Zhang Qianfan, *The Constitution of China*, 93.
[209] Lin Laifan, *From Constitutional Norm to Normative Constitution*, (Beijing: Law Press China 2001), 35.
[210] See the article 90 of the Legislative Law.
[211] Hu Jinguang, 'A Study of the Principles on the Procedure of the Constitutional review', *Studies in Law and Business*, No. 5 (2003), 3-13.

functions as well. [212] For the NPC, constitutional review means that: (1) it may supervise the implementation of the 1982 Constitution; (2) it may repeal or change laws by its standing committee. [213]In terms of the standing committee of the NPC, the constitutional review includes: (1) it may interpret the Chinese Constitution, as well as supervising the implementation of it; (2) it may repeal administrative laws and regulations which contradict with the Constitution[214]; (3) it may repeal local laws and regulations contradicting the Constitution, basic laws and administrative laws[215][216]. The NPC is said to have applied the mechanism only once so far[217], and the case in point is a resolution passed by the NPC, when enacting Basic Law of the HongKong Special Administrative Region (*xianggangtebiexingzhengqujibenfa*, 香港特别行政区基本法) in 1990. In the resolution, the constitutionality of the Basic Law of the HKSAR is regarded as being announced by the NPC, and the announcement was a constitutional review. [218] The standing committee of the NPC did not use the mechanism even once in their routine work, and no laws are repealed or changed by it[219].

Professor Xu Chongde (许崇德), a well-known mainstream constitutional lawyer, insisted that, the system of constitutional supervision(*xianfajianduzhidu*, 宪法监督制度), is a significant component element of the socialist democracy, and is established in the 1982 Constitution;[220] the enactment of Legislation Law perfected the system, especially when a specific office was set up in 2004, to keep on record legislations by administrative bodies and local government [221].

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[212] ibid

[213] See the 11th Paragraph of Article 62 of the Constitution 1982.

[214] See the 7th paragraph of Article 67 of the Constitution 1982.

[215] In China, a law involves in two categories, one category is passed by the NPC and the other is passed by the standing committee of the NPC. Administrative law refers to a law which is made by administrative branch of central and local government, while local law means a law is enacted by local people's congress and its standing committee.

[216] See the 8th paragraph of Article 67 of the Constitution 1982.

[217] Ye Haibo, 'Is It Possible for the Supreme People's Court to Make the Constitutional Review in the light of the Chinese Constitution 1982', *The Journal of Jiangsu Administration Institute*, No. 2 (2015), 133-138.

[218] Wang Zhenmin, 'A Study of the Subject and Procedure of the Chinese Constitutional Review', *China Law*, No. 1 (2006), 13-15.

[219] Miao Lianying, 'Is It Possible to Activate the Constitutional Review in China? How to Make It Possible?' *Journal of Zhengzhou University (Philosophy and Social Science Edition)*, No. 4 (2004), 46-52.

[220] Xu Chongde, 'A Study of the Chinese Constitutional Supervision', *Legal Science*, No. 10 (2009), 5-11.

[221] See the 7th paragraph of Article 67 of the 1982 Chinese Constitution.

According to Professor Xu, constitutional supervision may abolish or amend a law, thus, it should be exercised by the supreme state organ, the NPC and its standing committee[222]. Professor Xu posited that, in accordance with the 1982 Constitution and the Legislation Law, the constitutional supervision involves active supervision, by the NPC and its standing committee, and passive supervision, by (1) State Council (*guowuyuan*,国务院), Military Commission of the Central Committee of the Chinese Communist Party(*zhongyangjunshiweiyuanhui*,中央军事委员会), Supreme People's Court(*zuigaorenminfayuan*, 最高人民法院), Supreme People's Procuratorate(*zuigaorenminjianchayuan*, 最高人民检察院) and provincial People's Congress and its standing committee, which can ***require*** the standing committee of the NPC to check the constitutionality of laws[223]; (2) social groups, enterprises, public institutions and individuals, which can ***suggest*** the standing committee of the NPC to check the constitutionality of a law[224].

Compared with the viewpoint of constitutional review, which is employed more and more frequently by the Chinese scholars,[225] constitutional supervision seems to be a particular concept stemming directly from the wording of "supervising the implementation of the Constitution"[226]. However, it can be argued, there is no substantial difference between the two concepts[227]. No matter what kind of tag is attached to the so-called implementation mechanism of the 1982 Chinese Constitution, the essential feature of the mechanism is unchanged insofar as the mechanism is carried out by the NPC and its standing committee through a political process, instead of by a common court or constitutional court through judicial practice. In fact, detailed procedure or method about how to implement the Chinese Constitution, and how to deal with the unconstitutionality fails to be included in the 1982 Constitution and the Legislation Law, and this

[222] See the 7th paragraph of Article 67 of the 1982 Chinese Constitution.
[223] See the first paragraph, 90th Article of the Legislation Law.
[224] See the second paragraph, 90th Article of the Legislation Law.
[225] Lin Laifan, *From Constitutional Norm*, 35.
[226] Hu Jinguang, 'A Study of Constitutional Review and Related Concepts', *Law Science Magazine*, No. 4 (2006), 22-31.
[227] Xu Chongde, *A Study of the Chinese Constitutional Supervision*, 5-11.

makes the wording of "supervising the implementation of the 1982 Chinese Constitution" vague and unworkable.

In this sense, there is no implementation at all in Chinese constitutional theory, for both the constitutional review and the constitutional supervision are hypothesized by Chinese scholars. For instance, individuals are authorised, according to the Legislation Law, to suggest that the standing committee of the NPC check the constitutionality of an administrative law or local law, and this is called the right of proposal[228] by some scholars. In fact, individuals who submit written proposals to the standing committee of the NPC, are all legal elites, including professors and PhD students in public law, and the standing committee of the NPC has not answered the proposals at all[229]. A famous case, *Sun Zhigang Tragedy*(孙志刚案), will be discussed in the following paragraph as evidence of this, and the case is said to be an attempt to activate the implementation mechanism in China.[230]

Sun Zhigang died in a jail in Guangzhou (广州) on 20th March 2003, after 4 days' detention by the police, and the reason for the detention was that he did not carry a Temporary Residence Permit(*zanzhuzheng*,暂住证) with him[231]. *South Metropolitan Daily* (*nanfangdushibao*, 南方都市报) reported the tragedy, and this triggered a condemnation about an administrative document by State Council, *Measures for the Custody and Repatriation of Urban Vagrants and Beggars* (*chengshiliulangqitaorenyuanshourongqiansongbanfa*, 城市流浪乞讨人员收容遣送办法). The administrative document was enacted in 1982, and authorised local police to detain those who had no Temporary Residence Permits, for around one month. On 14th May 2003,three PhD students from Beijing University (北京大学), Yu Jiang (俞江), Teng Piao (滕彪), and Xu

[228] Wang Xiuzhe, 'A Study of the Legal Predicament and the Institutional Prospect in the Constitutional Review Initiated by Individuals', *Northern Legal Science*, No.1 (2010), 31-37.
[229] ibid
[230] Gu Gongyun, 'Reflections on Sun Zhigang Case', *Law Science*, No. 7 (2003), 20-22.
[231] In China, if a person wants to work or live in a city which does not accord with his household register (Hukou), the person must apply for a Temporary Residence Permit to a police station in the place of his residence. Without the Permit, the person may be repatriated (according to Measures for Custody and Repatriation of Urban Vagrants and Beggars) or fined.

Zhiyong (许志永), faxed a written proposal to the standing committee of the NPC, and suggested the constitutionality of *Measures for the Custody and Repatriation of Urban Vagrants and Beggars* should be checked. They claimed, according to article 37 of the 1982 Constitution, that detention could be employed, only (1) when the people's procurator approves or determines detention, or when the people's court determines detention, (2) relevant measures should be implemented by the police. Besides, personal liberty can only be deprived by laws, enacted by the NPC and its standing committee, according to articles 8 and 9 of the Legislation Law. *Measures for the Custody and Repatriation of Urban Vagrants and Beggars*, which was enacted by the State Council, restricted personal liberty, and this contradicted the Chinese Constitution and the Legislation Law. Thus, the constitutionality of this administrative document should be examined.[232]

A new administrative document, Measures for the Administration of Relief for the Vagrants and Beggars without Assured Living Sources in Cities(*chenshishenghuowuzhaodeliulangqitaorenyuanjiuzhuguanlibanfa*, 城市生活无着的流浪乞讨人员救助管理办法), was enacted by the State Council on 20th June 2003, and Measures for the Custody and Repatriation of Urban Vagrants and Beggars was replaced. Although *Sun Zhigang Tragedy* was considered as the first case which really used the constitutional review in mainland China[233], there is still a view that the proposal submitted by the three PhD students has not been accepted by the standing committee of the NPC, because the standing committee does not answer the PhD students' arguments in any form[234]. In fact, the question of constitutionality is invariably settled through informal approaches, rather than the constitutional supervision or

[232] Teng Biao, 'Re-examining the Constitutional Review in the Chinese Context', *Democracy and Science*, No. 2 (2004), 29-31.

[233] Chen Xiaoying & Zhen Dong, 'Three PhD Students Activated the Chinese Constitutional Review by Submitting the Written application', *Legal Daily*, 12-31-2003.

[234]Wang Zhenjun, 'The Analysis of significance and Improvement of the Citizen's Right to Put Forward Suggestions on Constitutional Review', *Hebei Law Science*, No. 11 (2009), 106-111.

constitutional review[235]. Therefore, the constitutional supervision is just a constitutional provision without any institutionalization, and the constitutional review, just an academic opinion, has never been put into effect[236]. In terms of the relevance of *Sun Zhigang Tragedy* to this PhD thesis, the case vividly demonstrates how the implementation mechanism of Chinese Constitution 1982 works. Broadly speaking, this may provide part of the contextual information about the failure of Chinese constitutional theories.

2.2.4 The Administrative Litigation: Judicial Review, or Judicial Decoration?

From the time of the establishment of the People's Republic of China until 1989, administrative acts by the Chinese government could not be challenged in people's court. Reasons for this may be: (1) Chinese power is organised on a basis of power fusion, as demonstrated in the system of the People's Congress, and the state organs are assumed to have no conflict with the interests of Chinese people; (2) the administrative branch and the people's court are all generated by the People's Congress; if the legitimacy of the administrative decisions and acts are examined by the people's court, the court will violate the particular power enjoyed by People's Congress, and one of the three litigation modes----the civil, criminal and administrative litigation, theoretically empowers the people's court to check the legitimacy of the specific administrative act by public bodies[237]. Some public lawyers hold that the system of judicial review has therefore been established in mainland China, [238] and they even wrote series of treatises with the same title: Chinese Judicial Review[239]. The Administrative Litigation Law classified the administrative act

[235] Tong Zhiwei, 'An Evaluation of the Development of the Constitutional Systems in China', *Modern Law Science*, No. 3 (2008), 142-155.

[236] Wang Kewen, 'A Study of the Main Barriers on the Introduction of the System of the Constitutional Review in China', *Modern Law Science*, No. 2 (2000), 72-74.

[237] Luo Haocai, *The Chinese Judicial Review*, (Beijing: Peking University Press 1993), 38.

[238] Hu Jinguan, A Study of the Constitutional Review and Related Concepts, *Law Science Magazine*, No. 4(2006), 22-31.

[239] See Series of treatise entitled *The Chinese Judicial Review* by Jiang Mingan (姜明安), Fu Siming (傅思明) and Luo Haocai (罗豪才) respectively.

into two categories: one is the specific administrative act, and the other is the abstract administrative act. According to the Law, the abstract administrative act refers to the enactment of administrative laws, regulations and other administrative documents, while the specific administrative act means specific decisions and actions based on the abstract administrative act.[240] For example, if a local government makes a regulation on the funding of primary schools, this is an abstract administrative act in the light of the Law; if a local government refuses to fund a specific primary school according to the regulation, this is a specific administrative act. The administrative litigation once dealt only with the power act executing specific decisions by administrative body, and the power act related to the making of the decisions were theoretically excluded. The Administrative Litigation Law seems to adopt a presumption that all administrative documents cannot be challenged, of course, this is not correct. The Administrative Litigation Law was amended in 2014, and the specific administrative act was replaced by the administrative act[241], meaning that all power acts by administrative bodies may be challenged in the people's court in theory. However, such a challenge is too difficult to be carried out in practice. The Chinese people's court, especially local people's court, have been confused by some of the complexities, or "the judicial syndrome[242]", including the financial dependency on local government, the personnel dependency on People's Congress and its standing committee in the same level, the judicial control of the Chinese Communist Party, etc.[243]. Against this backdrop, the people's court tends to overrule litigation by individuals and private bodies which challenges the government, or governmental departments[244]. Even if the litigation is accepted and heard by the people's court, extra attention is always paid to the legality of administrative act in question,

[240] Ye Bifeng, 'The Classifications onf the Administrative Acts, Concept Reconstruction or Back to the Root?' *The Political Science and Law Tribune*, No. 5 (2005), 38-48.

[241] See the Paragraph 2, Article 2 of the Administrative Litigation Law 2014.

[242] Zhang Qianfan, 'The People's Court in the Transition: Retrospect and Prospect of the Chinese Legal Reform', *Journal of National Prosecutors College*, No. 3 (2010), 59-71.

[243]Wang Kewen, *A Study of the Main Barriers*, 72-74.

[244] Cao Daquan, 'A Study of the Reform on Public Administration and the function of the Administrative Litigation', *Legal Forum*, No.4 (2010), 60-65.

and how to remedy the trespass of a plaintiff is always ignored by the judges.[245]Besides, the external intervention from the People's Congress and its standing committee[246], and the politics and law committee of the CCP, has made the people's court the weakest governmental body in mainland China. A well-known case called *Luoyang Seed Case*(洛阳种子案) can reveal the dilemma of courts, and the judge of the case is said to be the first who managed to review the legitimacy of a local legislation, which is contrary to the system of the People's Congress in the Chinese context.[247]

Luoyang Seed Case was originally an ordinary civil dispute about the fulfilment of a contract signed by two companies, wholesaling crop seed in Henan (河南) Province, and the case was heard in Luoyang people's court. The presiding judge, Li Huijuan (李惠娟) said, in the judgement, that the local law enacted by local People's Congress should not contradict basic laws enacted by the NPC, according to the Legislation Law; when the law enacted by the People's Congress of Henan Province, collided with the basic law by the NPC, the local law is of no effect[248]. What Li wrote was just the reaffirmation of the spirit of the Legislation Law, but the standing committee of the People's Congress in Henan Province held that the judgement was contrary to the system of People's Congress, by invading the power exclusive to People's Congress. The court was advised to dismiss the judge, Li Huijuan. Although the supreme people's court declared the validity of the judgement by Luoyang people's court, Li quitted the job.

The above case shows that the people's court is not an independent branch in the Chinese context, and judges cannot make independent judgements; in most cases, the people's court have to

[245]Yang Linping, 'Ten Focal Points in the Amendment of Administrative Litigation Law', *Journal of National Prosecutors College*, No. 3 (2013), 17-23.

[246]Zhang Qianfan, 'The People's Court in Transition: Retrospect and Prospect of Chinese Legal Reform', *Journal of National Prosecutors College*, No. 3 (2010), 59-71.

[247] Zhang Xiantang, 'Luoyang Seed Case and Judicial Review in China', *China Economic Times*, 12-03-2003.

[248] See the Judgement of Luoyang Seed Case, http://www.lawxp.com/cases/c606.html (accessed on 23-09-2015).

submit to the administrative branch, the people's congress and the Chinese Communist Party, due to the personnel appointment, the money, etc. Thus, the administrative litigation is not the judicial review known in Western countries, and without the independence of the judicial branch, the Chinese administrative litigation cannot break away from the eternal interventions from the People's Congress and the Chinese Communist Party. Administrative Litigation Law underwent an amendment in 2014, and this is regarded as being a great step forward in the construction of a Chinese society governed by law[249]; where courts review the administrative acts of local government according to the newly amended Law[250]. However, this does not mean that all actions of local government can be theoretically sued in the people's court, and this point will be further discussed later in this chapter.

Besides judicial litigation, a mechanism called administrative review is also available in Chinese theory, a process through which decisions or acts by the administrative branch may be questioned. The administrative review should be made by the administrative branch at the next higher level[251] according to the Administrative Review Law which was enacted in 1999, this means that the reviewing body is not an independent agency, and may have some interest involvement with the administrative body in question.[252] Some scholars even say that the unavailability of an independent reviewing body may produce injustice in the process of review.[253] In fact, no state organ is independent in the Chinese context, as will be discussed in Chapter three, and an independent reviewing body seems to be an ideal rather than a reality. In addition, not all decisions or acts by the administrative branch can be challenged through administrative review, and only specific administrative acts may be reviewed by the next higher administrative body[254].

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[249] Wu Peng & Hu Jinguang, 'The Amendment of the Administrative Procedure Law and the Construction of Chinese Society Governed by Law', *Journal of Chinese Academy of Governance*, No.1 (2015), 47-51.

[250] Zhang Zhiyuan, 'Changes in the Amendment of the Administrative Procedure Law', *Administrative Law Review*, No.1 (2015), 46-51.

[251] See the article 12 and 13 of the Administrative Review Law.

[252] Zhou Hanhua, 'Thoughts on the Judicialization of the Administrative Review', *Chinese Journal of Law*, No.2 (2004), 148-149.

[253] Sha Jin, 'A Study of the Judicialization of the Administrative Review', *Hebei Law Science*, No. 8 (2015), 80-88.

[254] See the article 1 of the Administrative Review Law.

The scope of the reviewable acts are listed in the article six of the Law, and the administrative acts related to local finance, especially land finance, are not included.

2.2.5 The Status of Local Government: Agent or Government?

As referred to in chapter 1, Chinese local government include three layers, that is, provinces, countries, and villages. However, the 1982 Chinese Constitution provides the three layers with no formal status and no formal divisions of functions between central–local governments or between the tiers of local governments. There is only a general principle in this area, which, set out in Paragraph four, Article three of the 1982 Chinese Constitution, is commonly regarded as being "the most fundamental" principle dealing with central-local relations in China[255].

> *"…the division of functions and powers between the central and local state organs is guided by the principle of giving full scope to the initiative and enthusiasm of the local authorities under the unified leadership of the central authority"*

However, it is too ambiguous to be put into effect[256]. Firstly, no specific mention of provinces, countries, and villages may be found in this provision, just a general expression of local state organs or local authorities. In the meantime, no division of functions and powers between local governments are to be found *vis a vis* in the light of the constitutional article. In fact, the principle is in a typical "Mao Style", and originated from *On the Ten Major Relationships* (*lunshidaguanxi*, 论十大关系) by Mao Zedong (毛泽东). Mao might intend to guard against potential local separatist regimes, and aim to strengthen central authoritativeness, by using this ambiguous expression;[257]in doing so, the ambiguity actually rejected the institutionalization of a fixed central-local power map, and encouraged central and local governments to consult with each

[255] Zheng Yi, 'A Study of Central-Local Relation in the Chinese Constitution 1982', *Oriental Law*, No.6 (2011), 46-51.
[256] Zhang Qianfan, *The People's Court in Transition*, 59-71.
[257] Feng Zhou, 'A Study of the Paragraph 4, Article 3 of the Chinese Constitution 1982', *Tribune of Political Science and Law*, No.5 (2007), 74-83.

other in the event of contradictions.[258] Thus, it is rather a political declaration than a legal provision[259]. Professor Su Li(苏力) once argued that rejecting the institutionalization of central-local relations was an indispensable "political tactic" in the early days of the new-born regime by the Chinese Communist Party. There was a danger that some rushed arrangements of the Chinese power structure may result in the catastrophic events, or even ruin the domestic peace.[260]What professor Su argued may be the case, but other possible reasons should not be overlooked. On the one hand, no one dared to officially advocate local self-government in mainland China, for self-government was always regarded as being the opposite of the unification of China. On the other hand, it is impossible for the central government to administer the vast territory and population of China, and local government must undertake some functions to reduce the workload of central government. The wording *initiative and enthusiasm*, indicates that local government should assume their own share of responsibility, although no clarification of the range of relevant responsibilities. In this sense, the general principle is not so much a "political tactic", as a sophisticated "political conspiracy", which aims at motivating the potentiality of local government without investing substantial power to them.[261]

Based on this blurred principle, functions of central and local governments are vaguely outlined, and they are said to bear a close resemblance to each other[262]. The functions of central government, the State Council (*guowuyuan*, 国务院), are listed as an inventory in the Article 89 of the Chinese Constitution, dealing with almost all aspects of social life in mainland China. The functions of local government, in theory, are almost the same as those of central government, with no distinct difference[263]. In practice, local government is undertaking such functions as education, health

[258] Cao Daquan, *A Study of the Reform*, 60-65.
[259] ibid
[260] Su Li, 'Political Reform, the Rule of Law and the Local Resources', *Peking University Law Journal*, No.5 (1995), 3-11.
[261] ibid
[262] Rong Qiuyan, A Study of Local Government Functions: Issues, Causes and Changes, *Inquiry into Economic Issues*, No.3, 2014, 32-37.
[263] Qin Qianhong, 'Exploring the institutional Arrangement on Central-Local Relations within the Framework of the Chinese Constitution 1982', *Journal of Henan Administrative Institute of Politics and Law*, No. 6 (2007), 15-18.

care, pensions, police, court, etc., similar with those of central government, except for some functions dedicated to the center, such as diplomacy and national defense. This makes local government a reproduction of the central government, and the functional similarity between central and local governments, to some degree, may release a strong signal of local autonomy[264], and may echo the local "*initiative and enthusiasm*". Thus, it is easy to misunderstand that "Chinese local government enjoys an autonomy which went by the name of democratic centralism(*minzhujizhongzhi*, 民主集中制)[265]". In reality, it is inevitable that functional similarity leads to functional overlap, even the shifting of responsibilities from the central to local governments, and this will be discussed in the *status quo* of local finance in 2.3.2.

It should be noted that local government, in this thesis, does not mean the three tires, that is, provinces, countries, and villages, as presented in chapter 1; only provincial government is included in the scope of local government and in the exploration of Chinese fiscal power in local government. Relevant reasons for choosing provinces as comparators with English local government have been provided in chapter 1.

2.2.6 The System of Budget Examination, Approval and Supervision.

According to the 1982 Constitution, People's Congress is responsible for the examination and approval of draft budgets,[266] and the whole procedure may be outlined as: lower tiers of government should report draft budgets to the People's Congress in the same level, and after the examination and approval, the lower tiers of government should report the approved budget to superior government. The superior government should record the approved budget from the

[264] Zhu Kongwu, 'A Study of the Legal Systems on the Local Participation in the decision-Making of the Central Government', *Legal Forum*, No.2 (2009), 52-58.

[265] Democratic centralism is a principle for state agencies in China, and learned from former Soviet Union. In the light of democratic centralism, separation and restriction of powers is excluded.

[266] See the paragraph 2, article 99 of the 1982 Chinese Constitution.

lower government, aggregate it and its own drafted budget, and report collectively to the People's Congress at its same level.[267] In terms of the examination and approval of governmental budget at the annual session of the People's Congress, the Budget Law includes some detailed provisions. First, the draft budget should be submitted to the standing committee of the People's Congress a month ahead of the annual session and the sub-committee on finance and economics examines preliminarily the draft.[268] During the annual session of People's Congress, the pre-reviewed draft should be handed out to the representatives; the representatives should read, discuss and vote on it, and the simple majority system is applicable to the approval of the annual budget. The supervision of the approved budget is theoretically in the charge of People's Congress, and the procedure is the same with the exanimation and approval.

Thus, the examination, approval and supervision of the draft budget is, in theory, based on the system of the People's Congress, and draft budgets should be discussed in the annual session of the People's Congress. This means that the representatives of the people, rather than the people who pay the tax, should be informed of how the revenue is raised, and where the expenditure is spent. Chinese people are virtually excluded from this kind of examination, approval and supervision. The failure of the People's Congress to make local government accountable for their fiscal policies or decisions will be further discussed in 2.3 of this chapter and in Chapter three. Meanwhile, and in theory, it can be assumed that no budget report can be vetoed, because there is no provision for dealing with the veto of draft budget in the case where representatives of the people do not agree to the budget report. In fact, the examination, approval and supervision are all formal procedures (this point will be discussed in 2.3). Besides, People's Congress is controlled by the Chinese Communist Party, it is impossible for the people to determine anything in the fiscal decision making process, and this point will be discussed in chapter 3.

[267] See the article 24 of the Budget Law.
[268] See the article 44 of the Budget Law.

2.2.7 Disclosure of Fiscal Information: at the Starting Point.

The Chinese Constitution provides no guidance about the freedom of information, although the 2014 amendment of the Budget Law includes some provisions about the disclosure of fiscal information both in central and local government: stating that the approved budget should be disclosed to the public within 20 days of its approval.[269] In terms of how, where, and what to disclose, the 2014 amendment fails to provide details. In any event, Regulation on the Disclosure of Government Information (*zhengfuxinxigongkaitioanli*, 政府信息公开条例), enacted by the State Council in 2007, provides, in general, principles as to the scope, the mode and procedures of disclosure. But the principles are formulated in such a general way that it is difficult to determine the real scope of disclosure. For instance, the Regulation classified disclosure as conditional and unconditional disclosure; the former is based on governmental permissions, and the latter means government should disclose relevant information actively.[270] "The information related to the vital interest of citizens, legal persons, and other groups, go to the category that should be published[271]". However, no provision interprets the word "vital interest", and no one knows what should be published in the light of this article. In terms of where to publish the governmental information, the Regulation suggests the government bulletin, the official website, the press conference, newspaper, or broadcasting.[272] Freedom of information is closely related to the transparency of governmental decisions, Chinese theory in this field is far from sound. How the preliminary system works in practice will be discussed in 2.3, and further illustrated from relatively advanced English counterpart in chapter 5.

[269] See the article 14 of the Budget Law.
[270] See the article 15 of the Regulation on the Disclosure of Government Information.
[271] See the article 9 of the Regulation on the Disclosure of Government Information.
[272] See the article 15 of the Regulation on the Disclosure of Government Information.

2.2.8 The Auditing System.

Articles 91and 109 of the 1982 Chinese Constitution are the only provisions relating to the auditing system in mainland China. According to the articles, the National Audit Administration is set up in central government[273], and resident offices of the National Audit Administration are established in local government[274]. The National Audit Administration and its resident offices, under the leadership of the State Council, are responsible for the auditing of central finance and local finance[275]. The audit power should be wielded independently; no administrative organs, social groups and individuals, are authorized to interfere with the auditing work.[276] Thus, relevant provisions in the Chinese Constitution provide a very vague frame of reference about the auditing system. Although auditing administrations are established both in central and local government, there is little guidance on how to ensure the auditing administration and its resident offices perform an independent auditing function, and Chinese theories fail to contribute further information. This mechanism is, in practice, powerless, and how the auditing system performs in the power process, especially in local government finance, will be discussed in 2.3. The auditing mechanism plays a role as an accountability mechanism in England, and detailed discussion will be made in Chapter five as part of the analysis of Chinese issues.

2.3 Chinese Reality: the Failure of Accountability Mechanisms.

The Chinese power practice in local finance is related closely to the fiscal circumstance of local government, which is the immediate result of the Chinese fiscal system, the revenue-sharing scheme. In the meanwhile, the revenue-sharing scheme, as mentioned previously, is always

[273] See the article 91 of the 1982 Chinese Constitution.
[274] See the article 109 of the 1982 Chinese Constitution.
[275] See the article 91 of the 1982 Chinese Constitution.
[276] ibid

ascribed to the arbitrary power in local government by most Chinese scholars. Thus, the section starts with reflections on the revenue-sharing scheme.

2.3.1 Reflections on Revenue-Sharing Scheme.

The revenue-sharing scheme was introduced by the Budget Law 1994, with the intention of rescuing central revenue, which, at the time, was said to be hovering at the edge of breakdown.[277] The driving force for the introduction of a revenue-sharing scheme was rooted in the failure of the third decentralization experiment carried out between 1978 and 1992, which was regarded as having produced "stronger local government relying on a weaker central government[278]". Three measures were adopted by this scheme: 1. central tax, local tax and central-local shared tax are differentiated between central and local government, and the revenue realm is divided in accordance with the tax categories as well; 2. The National Tax Bureau (*guoshuiju*, 国税局) and Local Tax Bureau (*dishuiju*, 地税局) were established to collect central taxes and local taxes, to ensure that central government could actually control the money; 3. The transfer payment system was set up, in order that a balanced development between different provinces may be maintained.

The revenue-sharing scheme was considered as being a momentous part of the new measures,[279] boosting "Reform and Opening-Up" both in depth and breadth, after Deng Xiaoping's (邓小平) Southern Tour in 1992[280]. According to Zheng Yongnian (郑永年) and Wu Guoguang (吴国光), one of the distinct features of the economic system reform in Deng's Era was decentralization, namely, 'dispersed' decision-making substit**u**ted for centralized decision-making, and the market-leading substituted for the state-steering.[281] Besides, "local legislation is not constrained

[277] Xiang huaicheng, 'Financial Reform in China', *China State Finance*, No. 19 (2009), 22-27.
[278] Zheng yongnian, *De Facto Federalism in China: Reforms and Dynamics of Central-Local Relations*, (Singapore: World Scientific Publishing 2007), 56.
[279] The establishment of market economic system is considered as a new stage of China's Reform and Opening.
[280] Ling Zhijun, *Ups and Downs: A Memorandum for the Chinese Economic Reform (from 1989 to 1997)*, (Beijing: The People's Daily Press 1998), 189-192.
[281] Zheng Yongnian & Wu Guoguang, *Central-Local Relation: An Axis Issues in the Institutional Transition in China*, (Hongkong: Oxford University Press 1995), 26.

in a straitjacket but is left with plenty of room to adapt to local needs and circumstances[282]". Thus, the revenue-sharing scheme has always been mistaken for a pattern of fiscal decentralization by some scholars, especially some economists, due to the implications which arise from the words "revenue-sharing"[283]. Qian Yingyi (钱颖一), a famous economist, once held that the federalism of the Chinese style, which is market preserving, is different from that of Russia, the style of market-disruption.[284] To some degree, this scheme has indeed geared up the establishment and improvement of market economy which brought about an economic boom to China. But simple differentiation of the central tax, local tax and central-local shared tax, does not lead to due changes as the nomenclature "revenue-sharing" seems to promise. Economic prosperity cannot conceal the inherent deficiency of revenue-sharing. In fact, the scheme has evolved into a mechanism of central-local fiscal game, and to reform the scheme, or to reconstruct central-local fiscal relation is extremely urgent[285].

2.3.2 *Status quo* of Chinese Local Finance.

Fiscal relations between Chinese central and local governments is now considered as being a kind of fiscal game[286], and local government are expanding fiscal sources with no restrictions. This section will explore how the fiscal game plays and how the fiscal expansion is caused, by presenting two sub-sections entitled "revenue centralizing and expenditure decentralizing", and

[282] Zhang Qianfan, *The Constitution of China*, 122.

[283] See Zhang Xiaobo, 'Fiscal Decentralisation and Political Centralisation in China: Implications for Growth and Inequality', *Journal of Comparative Economics 34 (2006), 713-726*; Hehui Jin, Yingyi Qian & Barry R. Weingast, 'Regional Decentralization and Fiscal Incentives: Federalism, Chinese Style', *Journal of Public Economics,* 89(2005), 1719-1742; Yingyi Qian & Gerard Roland, 'Federalism and the soft Budget Constraint', *The American Economic Review*, Vol.88, No.5 (1998), 1143-1162.

[284] Hehui jin, Yingyi Qian & Barry R. Weingast, 'Regional Decentralization and Fiscal Incentives: Federalism, Chinese Style', *Journal of Public Economics*, Volume 89 (2005), 1719-1742.

[285] This is a common view in Chinese academic circle. See references from Zhang Qianfan, Feng Xingyuan, Miao Lianying, Liu Jianwen and Zhou Gangzhi.

[286]Miao Lianying & Cheng Xueyang, 'Revenue-Sharing Scheme, Local Bond and the Reform of the Central-Local Fiscal Relation', *Journal of Henan Administrative Institute of Politics and Law*, No. 4 (2009), 29-35.

"the failure of transfer payment system", in the process, the *status quo* of the Chinese local finance will be considered.

2.3.2.1 Revenue Centralizing and Expenditure Decentralizing.

The revenue-sharing scheme speeds up fiscal centralization, although differentiating the tax categories between central and local government; in fact, it is argued that it results in the unparalleled centralization of revenue[287], arising from at least five issues:

> (1). The power to determine tax rates and a tax base, still rests entirely with central government, and the legislative power of taxation which allows central government to adjust revenue sources according to its own will,[288]is still firmly and exclusively enjoyed by central government. How to legally raise revenue is, in a sense, vital for fiscal power, and tax legislative power is undoubtedly a priority among the priorities for how much revenue may be raised through tax collection.[289]Thus, the legislative power of taxation lies in the heart of fiscal power, and the fact that legislative power is highly centralized is a proof of Chinese fiscal centralization.[290] In this sense, local tax without tax legislative power is merely a delegation of some kind. Although local tax, central tax and central-local shared tax are divided in accordance with the revenue-sharing scheme, central government monopolizes the allocation of fiscal sources[291]through defining exclusively the categories of taxes, then controls quality tax sources from which more revenue can be levied. This is why local tax involving 70% of all tax categories[292], obtains less than 50% of all tax revenue[293].
>
> (2). Tax administration is still centrally controlled, although local government is granted the power to raise money from local taxes and part of

[287] Wang Xukun, 'Vesting Financing Right to Local Government and Budget Reform', the Symposium of the Annual Conference on tax Law 2012, 56.
[288] Ling Zhijun, *Ups and Downs*, 189-192.
[289] Ge Kechang, *Basic Theory on Tax Law: a Perspective of Fiscal Constitutionalism*, (Beijing: Peking University Press 2004), 3-6.
[290] Hu Shudong, Central-Local Relations in Economic Development: Changes on Financial System, (Shanghai: Sanlian Bookstore Press 2001), 55-56.
[291] Ling Zhijun, *Ups and Downs*, 189-192.
[292] ibid
[293] Hong Jiang, 'Fiscal Game and Improvement of Central-Local Fiscal Relation', *Journal of Guangdong Institute of Public Administration*, No.5 (2008), 67-71.

central-local shared tax. Central government set up its own tax-collecting agency, the National Tax Bureau, to collect central taxes and central-local shared tax; rather than to entrust the tax bureau (existing before the revenue-sharing scheme 1994) with the task of collecting virtually all tax[294]. Thus, local government is excluded from the whole process of central-tax, and central-local shared tax collection.

(3). Debt financing has been theoretically centralized, this means local government cannot raise money through debt financing, such as bonds. Local government, which have been deprived of the direct finance power by the revenue-sharing schemes,[295] are stopped from exercising a second possibility to get money in case of emergency[296].

(4). Tax preferences, including tax reduction and exemption, are determined by central government through the promulgation of administrative documents; and this will be detrimental to local revenue rather than central revenue.

(5). Tax sources are not equally distributed in local government, and this is largely dependent on where local government is located, e.g. in the west, middle and east; Eastern provinces, such as Guangdong (广东), Beijing (北京) and Shanghai (上海), can collect a lot more money, than provinces from western China, represented by Sichuan (四川), Qinghai (青海) and Xinjiang (新疆).

Therefore, local government depend more deeply on central government than ever before[297], and the revenue-sharing scheme has turned into an alternative word for fiscal centralization. Disparities between different areas have an aggravating effect, and the revenue-sharing scheme is criticized as both a pattern of fiscal centralization, and a mechanism of "robbing the poor and giving to the rich".[298]

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[294] Wang Shaoguang, 'China's 1994 Fiscal Reform: An Initial Assessment', *Asian Survey*, Vol.37 (1997), 801-817.
[295] See the article 28 of the Budget Law (1994).
[296] Guo Weizhen, 'A Study of the Debt Financing Power of local Government in a Fiscal Federalism', *Journal of Henan Administrative Institute of Politics and Law*, No. 3 (2007), 18-25.
[297] Ling Zhijun, *Ups and Downs*, 189-192.
[298] Wang Xukun, *Vesting Financing Right to Local Government*, 56.

However, as far as fiscal expenditure is concerned, Chinese local government undergoes decentralization hindered by their weak finance, in accordance with the revenue-sharing scheme;[299] nevertheless local government is responsible for the provision of public goods and service, with no power to raise adequate revenue at its own will or real demand.

Between 1949 and the 1980s, under the planned economic system, central government acted as, through the allocation of pre-set "plans", not only the owner of all social resources, but also as the organizer and operator of social production and economic development. The pivotal responsibility of local government was to carry out the "plans" in fulfilling the economic targets set by central government. Therefore, local government were merely agents of central government, or the subsidiaries of their 'Mother'[300]. Besides, during that period of time, "state" and "society" were mixed as a whole in mainland China. The "state" got involved in "society" via all kinds of "plans", and the provision of necessities instead of public goods was undertaken by the state-owned enterprises within China.[301]At that time, how to spend money was a matter of state-owned enterprise, rather than a matter of governmental finance. In this sense, the fiscal expenditure of local government was firmly regulated by the economic "plans" through the state-owned enterprises.

Following the introduction of the market economy in 1992 things changed, and local government began to provide public goods and service, such as education, health care, etc. within their jurisdictions, rather than serving merely as agents of central government. This illustrates the value of the independent existence of local government[302], which required more money to assume their social functions. The revenue-sharing scheme changed the balance of responsibilities between the central and local governments in respect of fiscal affairs, without formulating a

[299] Ling Zhijun, *Ups and Downs*, 189-192.
[300] Lin Shen, *Relationship between different Levels of Government in China*, (Hangzhou: Zhejiang People's Publishing House 1998), 116-121.
[301] Ye Shan, *The Formation and Reinforce of the Power to Tax*, 124-141.
[302] Miao Lianying & Cheng Xueyang, *Revenue-Sharing Scheme*, 29-35.

specific program on how to divide functions between different levels of government[303]. Thus, with the differentiation of tax categories, fiscal expenditure which was previously undertaken by the central government on basic education, public health and pensions, has been transferred to local government.[304] During the period between 1994 and 2006, central revenue accounted for 52% of all government revenue, and local revenue made up 48%; while central expenditure accounts for 30% of total public spending and the local expenditure made up 70%[305]! It is quite clear that local government were caught in a fiscal difficulty and could not make ends meet.

It is undoubtedly the case that revenue-centralizing and expenditure-decentralizing add to the fiscal difficulties in local government. However, Hu Shudong (胡书东)argued that this unique feature provides a perfect direction for deepening the revenue-sharing scheme in the future[306]. He said that the revenue-sharing scheme was rooted in the specific political and social situation in China.[307] On the one hand, within a developing country with a vast territory and a large population, central government could not take on everything in the provision of public service, which keeps a direct correlation with fiscal expenditure.[308]Thus, local government should be entrusted with more functions in tackling the potential information asymmetry between central and local governments, which may bring a negative effect to the provision of public goods or service, and the expenditure decentralization served precisely as an ideal device to fulfil the task. On the other hand, revenue centralization was a practical and reasonable choice based on the Chinese political and economic circumstances[309]. Revenue controlling is an essential tool for central government to exert influence upon local government, and this may enhance the holistic efficiency of the fiscal expenditure in the case of missing an effective supervision mechanism of

[303] Zhu Qiuxiang, 'Tendency and Feature of the Administrative Decentralization in China', *Journal of Politics and Law*, No. 11 (2009), 12-20.
[304] Miao Lianying & Cheng Xueyang, *Revenue-Sharing Scheme*, 29-35.
[305] ibid
[306] Hu Shudong, *Central-Local Relations in Economic Development*, 76.
[307] ibid
[308] ibid
[309] ibid

public spending.[310]In the process, the centralization of the tax legislative power has played a key role in supervising and controlling fiscal activities in local government[311].

The argument by Hu Shudong, goes to the heart of Chinese fiscal system and the proper nature of public finance; but negative aspects of the revenue-sharing scheme, or the revenue-centralizing and expenditure-decentralizing, had been reduced, or even been turned upside down. After about 20 years' operation, "revenue centralizing and expenditure decentralizing" has changed into a disguised game between central and local governments: the central government has been imposing restrictions on local government from time to time, and local government have been rebounding again and again[312]. Thanks to this game of centralization and decentralization, local government sank deeply into fiscal difficulties.

2.3.2.2 The Failure of Transfer Payment System.

Theoretically speaking, the transfer payment system (*caizhengzhuanyizhifuzhidu*, 财政转移支付制度) is a possible and legitimate approach, to which local government can resort in order to cope with fiscal difficulties stemming from "revenue-centralizing and expenditure-decentralizing". The system, dominated by central government and administered through grant aid, is considered as being an institutional device harmonizing the fiscal inconsistency between central and local governments,[313] and is said to maintain the equalization of the provision of public goods between different areas[314]. It should be an important mechanism of control employed by the central government to seek more influence over local government[315]; transfer

[310] ibid
[311] ibid
[312] Miao Lianying & Cheng Xueyang, *Revenue-Sharing Scheme*, 29-35.
[313] Kou Tiejun, 'A Qualitative Analysis of Central-Local Fiscal Relation', *Financial Study*, No.11 (1997), 32-34.
[314] Zhou Feizhou, 'Revenue-Sharing Scheme: Institution and Its Effect', *Social Sciences in China*, No.6 (2006), 101-116.
[315] Liu Jianwen, 'A Study of the Legislation on Transfer Payment', *Juridical Science Journal*, No. 5 (2005), 33-37.

payment law or related laws should provide a legal basis for the allocation of "grants" between different provinces.[316]

However, the transfer payment system, in the Chinese context, is based on series of administrative documents[317]instead of transfer payment law, and the operation of the system is out of scrutiny. By the end of 2002, the total amount of transfer payment soared to 402 billion Yuan (RMB), accounting for 33% of the national income[318], and the vast amount of money is actually monopolized by ministries and commissions, who exercise substantial power in the name of central government. The lack of effective restrictions, and the unreasonable and ambiguous formulation of the "grant", greatly undermined the expected influence of the transfer payment system. The drawbacks of the system itself, and the lure of money, have led to a phenomenon---"lobbying ministry and getting money"[319]. In order to obtain the utmost amount of money from the transfer payment system, local government take every opportunity to lobby ministries and commissions through some sophisticated and destructive methods[320], such as organizational corruption and collective corruption. Thus, both the amount of money and the number of senior officials implicated in corruptions have been rising dramatically[321]. The transfer payment system has degenerated into a *platform* for corruption, and local government has undoubtedly changed into the organizer and impeller behind it.

Overall, the transfer payment system has deviated from the original institutional target, and the fiscal difficulties of local government and the fiscal disparity between different provinces have been intensified. As a result, the livelihood issues of the Chinese people, still rest with the

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316 Guo Qingwuang, Jia Junxue & Gaoli, 'Transfer Payment and Economy Development in Local Government', *The Journal of World Economy*, No. 12 (2009), 17-28.

317 Liu Jianwen, *A Study of the Legislation on Transfer Payment*, 33-37.

318 Zhu Kongwu, 'How Local Government Participate Central Decisions: a Study of Local Government's Beijing Office', *Legal Forum*, No. 2 (2009), 52-58.

319 ibid

320 Gong Ting, 'Corruption and Local Governance: the Double Identity of Chinese Local Governments in Market Reforms', *The Pacific Review*, Vol. 19 (2006), 85-102.

321 Andrew Wedeman, 'Anticorruption Campaigns and the Intensification of Corruption in China', *Journal of Contemporary China*, Vol.14 (2005), 93-116.

education, healthcare and housing[322]; the provision of public services in poverty-stricken areas located in the west or mountainous areas, is even tougher, which has resulted in actual inequality of human rights[323].

2.3.3 Unlimited Expansion in Local Finance.

2.3.3.1 Basic Facts in Land Finance.

Against the background of "revenue-centralizing and expenditure-decentralizing", local government in mainland China fell into fiscal difficulties, and traditional approach to resolving the dilemma, the transfer payment system, fell flat for reasons presented in the above section. To increase their revenue, local government embarked on what is called "fiscal expansion", and sought off-budget funds, such as "land finance", a method used by local government in the expansion of local finance.[324]Land finance allows local government to expand their financial resources effectively and promptly, but it breeds all sorts of corruption, sharpens contradictions between officials and the public, adds to the fiscal risks of local government, and infringes human rights.[325]

Land finance is the most effective and frequently-used approach in the expansion of local finance, and it is based on the state ownership of land.[326] The logic of land finance rests in local government selling the "use right" of a piece of land to real estate agencies on behalf of the state[327], and the real estate agencies construct buildings on the land and markets them

[322] http://news.xinhuanet.com/fortune/2006-03/02/content_4247204.htm (accessed on 25-09-2015).
[323] Miao Lianying & Wu Lining, 'Revenue-Sharing Scheme and the Fiscal Relation Central-Local Governments', *Tribune of Study*, No.2 (2010), 75-80.
[324] Ling Zhijun, *Ups and Downs*, 189-192.
[325] Hong Jiang, *Fiscal Game and Improvement*, 67-71.
[326] According to the article 10 of the 1982 Constitution, land located in city or town belongs to the state and that in village and suburban area to the collective. In official context, collective means an autonomous organization made up of villagers or citizens. But in fact, collective is a quasi-governmental body which acts as the lowest layer or an extension of the government.
[327] For collective ownership, the government purchases the ownership from the collective first and sells it afterward, of course, at a low price in purchasing and higher price in marketing.

commercially. How much revenue is generated in the process depends, on the one hand, on the land price, the higher the price of land, the more money the government can obtain, and on the other hand, the collection of business tax, a kind of local tax produced in the selling of the commercial buildings. The money local government gets from land finance, can be described as a kind of off-budget revenue, on which central government and People's Congress cannot exert scrutiny. In the Chinese context, tax revenue was divided into budgetary revenue and off-budget revenue, the former should be examined and approved by the People's Congress annually, and the latter was free from any scrutiny. The situation changed with the amendment of the Budget Law in 2014, and the differentiation between budgetary revenue and off-budget revenue was abolished. However, this change does not influence the expansion of land finance too much, since the examination and approval of local budget are only in form (this point will be discussed in 2.3.3.2).

Land finance, together with the prosperity of the real estate market in mainland China, is regarded as being an indispensable part of the Chinese urbanization[328]. To clear away obstacles to land finance, buildings previously constructed on the land face forced eviction, an inevitable twin sister of the expansion of local finance. In 2007, the total amount of local revenue was 2.3 hundred million Yuan (RMB), and the land sale contributed 1 hundred million Yuan (RMB)[329]; by the end of 2010, local government relied on the land sale to generate 71.7% of its revenue[330]. As a matter of fact, Chinese local finance has been transformed into land finance,[331] which facilitates the super growth of local revenue, and creates plenty of social tragedies and group

[328] Chen Zhiyong & Chen Lili, Problems and Countermeasures on the Land Finance, 2012, Economic Science Press, P. 96.

[329]Yang Zheng, A study of the Land Finance and the Income Pattern in Local Government, Housing Industry, No.10, 2011, P. 49-52.

[330] Ministry of Finance of People's Republic of China: "Report on Implementation of Central and Local Budge 2011 and Draft Budget of Central and Local Budge 2012", http://news.xinhuanet.com/politics/2012lh/2012-03/16/c_111666182.htm (accessed on 25-09-2015).

[331] Wu Yue, Three Questions on the Land Finance and the Institutional Reforms, Tribune of Political Science and Law, No.4, 2011, P. 28-40.

conflicts, as well as environmental pollution and the wasting of resources[332]. The incident of *Tang Fuzhen*, mentioned in chapter 1, is a well-known tragic example.

The practical impact of the unlimited expansion of land finance has been partly touched upon in chapter 1 through the presentation of *Tang Fuzhen Tragedy*, a very famous Chinese case. Here, more information in this field will be provided. As discussed in chapter 1, human rights are infringed by forced eviction, and no accountability mechanism worked in the process. The principle aim of local government is to obtain money for the user right of the state-owned land and correlative tax, which should be enjoyed by local government according to the revenue-sharing scheme. But this raises the issues of whether or not the money from land selling is legitimate, and how the money should be spent? It raises a further issue of whether local government should be allowed to carry out the land selling legally? The accountability mechanisms fail to work in responding to these issues.

First, whether or not the selling of the land of *Tang's* factory is approved by the local people's congress, or whether or not this kind of revenue-raising was included and checked as part of the budget, or how the local government spent the money originated from the land selling, are unknown due to the formal disclosure of fiscal information (the point has been discussed in 2.2.7). In the process, the only thing which was made certain is that the local government needs the improvement of GDP, and to better its economic performance. *Tang* did not make a lawsuit or administrative review, instead, she burnt herself to demonstrate her revolt against unlimited power. A possible reason for this extreme step may be the fact that she knew the difficulties involved in an ordinary citizen suing the government, particularly as such litigation may work as a negative confirmation of the failure of the legal mechanism and administrative legal mechanism in practice. The *Tang Fuzhen Tragedy was not* included in the annual audit report, and the auditing mechanism paid no attention to the arbitrary exercise of fiscal power in Tang's case.

[332] ibid

With the failure of accountability mechanisms, the exercise of public power was out of control in the selling of the land of *Tang's* factory, in the process, to remove the obstacles of land selling, armed police were even called out, and they ignored *Tang's* right to life, and *Tang's* property rights. It should be noted that the then governor of *Tang*'s local government, Li Chuncheng (李春城) was prosecuted for corruption in the anti-corruption campaign pushed by the CCP in 2014, and the sum involved money to the amounts of forty million Yuan (RMB).[333] Li Chuncheng was once famous for his performance in the economic development of Sichuan Province, and land finance was a main measure, this may be reflected in his nickname---"an expert of removing city". In fact, removing city was only one aspect of this expert, and he even introduced quite a few polluting enterprises, including cement plants, sulphuric acid plants, paper mill, and phosphate fertilizer plants, to push in removing the city. [334] In order to improve the enterprises, and the contribution to local tax; environmental monitoring on these plants was loosened. Similarly, no accountability mechanism worked to deal with this situation. As a result, deleterious water and harmful gas were discharged, and atmospheric air and groundwater were contaminated. The *Tang Fuzhen Tragedy* and relevant problems arising from the land finance in her province, are not an exceptional phenomenon in China. Actually, similar stories occur in nearly all local government, and this is part of the reason why 21 provincial governors are prosecuted in the anti-corruption campaign launched in 2011, and why there is a heavy smog over most of China in the winter.

It cannot be ignored that land finance works as one of the important elements which pushes up housing prices in China[335] . To retain the land price at a high level, local government prefers to issue policies maintaining the upward movement of housing price[336]to stimulate real estate

[333] Sina News (online), at http://news.sina.com.cn/c/nd/2015-10-12/doc-ifxirmpy1531540.shtml (accessed on 23-10-2015).
[334] ibid
[335] Zhou Bin & Du Liangsheng, 'Land Finance and the Rise of Housing Price: Theoretical Analysis and Empirical Study', *Finance and Trade Economics*, No. 8 (2010), 111-118.
[336] Liu Shuangchang & Li Daokui, 'Fiscal Basis for the Second Housing System Reform: An Analysis on the Relations between Land Finance and Housing Price', *Public Finance Research*, No.7 (2010), 7-13.

agencies to compete in the land auctions organized by local government. Moreover, local policies always challenge or contradict the macro-policies, which is to lower housing prices.[337]. Since 2003, central government has suppressed housing prices on 32 occasions by issuing related policies[338], but all the policies failed to work and housing prices have been rising.[339] In the process, local government managed to rescue the real estate market by using countermoves. To some extent, the high-level housing price and frequent failures of central government's macro-policy, serve as an illustration of the central-local fiscal game. The central government manages to regulate and control housing prices, whilst local government manage to resist the center[340].

2.3.3.2 Free from the Examination or Formally Examined at the People's Congress.

As discussed in the above section, the money local government get from land finance includes the money for the "use right" of the state-owned land, and the business tax from the purchasing or selling of the commercial building constructed by the real estate companies. The section 2.2.6 has mentioned that draft budgets should be examined and approved by the People's Congress in the light of the 1982 Chinese Constitution, but in practice, both of the two portions are free from the scrutiny of People's Congress. The former, the money for the "use right" of the land, was a kind of off-budget revenue, legally free from supervision of any kind in the Chinese context; the latter, the money from the business tax related to the land trade, is actually free from the examination of People's Congress. The "off-budget" is, in a sense, an alternative "unlimited" budget, because the amount of money in the form of off-budget money are all kept secret[341]. In this sense, the existence of off-budget money is regarded as being the inevitable result of the

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[337] Gong Rukai, 'Revenue-Sharing Scheme, Land Finance and Housing Price', *World Economic Papers*, No.4 (2012), 94-108.

[338] Zou Xiaoyun, 'Who Influences the Housing Price', *Liaowang News Weekly*, No. 51 (2014), 48-49.

[339] ibid

[340] Liao Xiaoyuan, 'A Study of the Controlling Measures of the Housing Price: A Perspective of the Fiscal Game between Central and Local Governments', *Journal of the Party School of Leshan Municipal Committee of the Chinese Communist Party*, No. 1 (2008), 32-33.

[341] Zhang Mengzhong & Marc Holzer, 'Reshape Central-Local Fiscal Policies: A Study of off-budget money', *Chinese Public Administration*, No.11 (2003), 64-69.

Chinese planned economy[342]; the more off-budget money local government controls, the more desire they feel to expand the source of "off-budget". As a result, the off-budget money works as the private coffers of Chinese local government[343], and land finance provides the ever-increasing desire for unchecked money.

With the amendment of the Budget Law in 2014, the off-budget revenue was repealed, and all public money, in theory, should be examined as part of the annual budget. However, the examination and approval of budget report is only formal process at the annual session of People's Congress[344], and it is extremely rare for the draft budget to be rejected by the People's Congress. In 2002, the People's Congress of a county in Hunan Province, called Yuanling (沅陵), vetoed the budget report by the local government; the veto shocked academic circles and presented a new subject for research in respect of the system of People's Congress, in other words, how to deal with the veto of a budget report at People's Congress[345]. The veto may be related to the reduction of teachers' wages, rather than a real criticism of the collection and spending of money[346]; and, after officers from local government gave an explanation about why teachers' wages were reduced, the budget report was approved another day. In fact, a majority of budget report are always approved with no questions, and the so-called examination is just to carry out the scheduled agenda of the annual session of People's Congress. First, the duration of annual session of the National People's Congress is always around 15 days, and the session of provincial People's Congress lasts merely 7 days[347]; the time for the examination and approval of the budget

[342] Zhang Yueling & Xiao Guojin, 'History and Prospect of the Off-Budget Money in Mainland China', *Theory and Practice of Finance and Economics*, No.2 (2000), 69-70.
[343] He Yonghai, 'When the Money for the Use Right of Land Can be scrutinized?' *China Youth News*, 01-04-2015.
[344] Ding Jing, 'Issues and Advices on the Examination and Approval of Government Budget', *Western Finance and Accounting*, No.10 (2009), 8-11.
[345] Tian Biyao, 'Exploring the Veto of Budget Report of Yuanling Local Government by the Local People's Congress', *Ren Da Jian She*, No.2 (2003), 10-11.
[346] ibid
[347] Qin Qianhong, 'Why the Duration of Annual Session of the People's Congress becomes shorter and shorter?' *China Trial*, No.3 (2011), 104.

report is no more than a half day at the annual session of People's Congress[348] (the effective time may be two or three hours). Within so short a time, the representatives have no time to read through the budget report at all[349]. Even if there is enough time for them to read the report, they cannot understand it at all[350]. The budget report is always professionally written. If the representatives have no professional knowledge on finance, they have no idea about the real meaning of the budget report[351]. Even if the budget report is easily understood by the representatives of the people, who effectively, by paying taxes help government subsist, they still have no knowledge to determine how to raise and spend the public money[352]. As discussed earlier, the People's Congress is actually controlled by the Chinese Communist Party through various methods[353], and the examination and approval of the budget reports is considered as being a formal demonstration of the superiority of the system of People's Congress.[354] The theoretically "bottom-up" democratic mechanism has been overthrown by the absolute control of the Chinese Communist Party over the Chinese power practice, and the practical mechanisms through which the Chinese ruling party monopolizes the fiscal power in local government will be explored in chapter 3.

2.3.3.3 Unchallengeable in People's Court.

Chinese local government is expanding their fiscal resources in the name of land finance, in the process, public powers seem to be arbitrary and unlimited. It is curious why such unlimited power is not challenged in the people's court. The socialist legal system with Chinese characteristic,

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[348] Zhu Daqi & Li Rui, 'Exploring the Approach to the Perfection of the Examination and Approval of the Drafted Budget: on the Potential Amendment of the Budget Law', *Contemporary Law Review*, No. 4 (2013), 101-108.

[349] Wang Baineng & Du Fangwen, 'Three Problems in the Budgetary Supervision of People's Congress', *Nan Feng Chuang*, No.5 (2004), 26.

[350] Feng Guo & Li Anan, 'A Study of Redemption of Local Financing in the Light of Fiscal Laws', *Law Science*, No. 10 (2012), 22-16.

[351] Zhu Daqi & Li Rui, 'To Perfect Examination and Approval of Budget Report', *Contemporary Law Review*, No.4 (2013), 101-108.

[352] Yan Hai, 'Democracy should be the Core of Budgetary Power', *Chongqing Social Sciences*, No.4 (2007), 104-109.

[353] Chen Wei, 'A Study of the Relations between the Chinese Communist Party and the People's Congress', *Academic Bimestris*, No.3 (2008), 57-63.

[354] Lu Zhengtao, 'To Uphold and Perfect the Leadership of the Chinese Communist Party through the System of People's Congress', *Journal of Guizhou University (Social Sciences)*, No.6 (2006), 6-9.

was said to be established in 2010, [355] and this implied that laws by the NPC and its standing committee, may play an important role in dealing with all kinds of social conflicts[356], including the issues related to local finance. If social problems stemming from the land finance are an inevitable results of the administrative acts of local government, could they be sued and challenged in the light of the Administrative Litigation Law (*xinzhengsusongfa*, 行政诉讼法)?

As discussed in 2.2.1 and 2.2.4, the courts and administrative branch are generated by People's Congress, and they should perform their functions in the light of the laws formulated by the People's Congress. If the administrative branch may be challenged in the people's court, the authority of the People's Congress may be challenged, thus, the weak status of the judiciary is the result of the system of the People's Congress[357]. Against this institutional background, the court and the judges become very passive and vulnerable in the Chinese context. On the one hand, People's Congress may intervene in judgements, as demonstrated in the "Luoyang Seed Case", taking their lead from the Chinese Communist Party (will be discussed in chapter 3); on the other hand, the courts do nothing in some administrative litigation cases, especially those concerning land finance.

In the Chinese context, administrative litigation cases are popularly called "the people suing the government", referring to, in general, the great difficulties and remote possibilities of an ordinary citizen to defeating the government. According to Wang Zhenyu (王振宇), the deputy chief judge of the administrative division of the Supreme People's Court, the distinctive feature of Chinese administrative litigation lies in the extremely small failure rate of government[358], and the fact that on average, ten per cent of people can actually defeat the government in administrative ligation[359].

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[355] Xin Chunying, 'Significance of Socialist Legal System with Chinese Characteristic', *Legal Information*, No. Z1 (2014), 65.

[356] Wang Zhaoguo, 'The Significance of the Establishment of Socialist Legal System', *Law and Society*, No. 2 (2011), 18-19.

[357] Xiao Jinming, 'A Study of the People's Congress and Chinese Judiciary', *Journal of Yunnan Normal University (Humanities and Social Sciences)*, No.6 (2012), 48-57.

[358] Zhang Yu, 'An Exclusive Interview with Experts working for the Amendment of the Administrative Procedure Law', *Dahe Daily*, 05-11-2014.

[359] ibid

In fact, not all issues produced in the development of land finance were litigious. As discussed in 2.2.4, the administrative acts are classified as the abstract and the specific administrative acts in the light of the Administrative Litigation Law, amongst, the abstract administrative act, directing at no specific administrative counterpart and being applicable again and again, could not be challenged in the people's court.[360] For instance, legislation is a typical abstract administrative action in the Chinese context, and the compilation of a government budget is abstract as well. Thus, the expenditure written into the budget report of local government, could not be questioned through a judicial procedure. As mentioned in 2.3.3, the Administrative Litigation Law underwent an amendment in 2014, abstract and specific administrative acts may be challengeable in the light of the amendment.[361] However, abstract administrative actions cannot be directly challenged by individuals or private bodies; only when the legitimacy of a specific administrative act is challenged, can relevant abstract administrative acts be checked incidentally by the people's court.[362] In fact, during the past ten years, cases related to forced eviction, and just compensation *vis a vis* evicted buildings, which are included in the specific administrative acts and are litigious under the old and new Laws, account for the majority of "the people suing the government"[363], but the people's court always refused to hear these kind of cases with no proper reasons.[364] Against this backdrop, common citizens lose confidence in the people's court, and unrestricted power becomes more brazened.

The direct cause for the refusal to hear these kind of cases may be the direct correlation between land finance and the policies of the Chinese Communist Party (will be discussed in chapter 3)[365],

[360] Zhang Shuyi, 'Abstract Administrative Action could not be sued and could be reviewed incidentally', *Law Science*, No. 5 (1991), 3-6.
[361] Zhang Zhiyuan, 'Changes in the Amendment of the Administrative Procedure Law', *Administrative Law Review*, No.1 (2015) P.46-51.
[362] See the article 53 of the Administrative Law 2014.
[363] Yang Xiaojun, 'Reflections on the Scope of Accepting Cases in Administrative Litigation', *Studies in Law and Business*, No. 4 (2009), 87-93.
[364] Wang Liwan, 'Administrative Litigation Law and the Legalization of Central-Local Relation', *Law and Social Development*, No. 1 (2015), 33-34.
[365] Zhang Yu, 'An Exclusive Interview with Experts working for the Amendment of the Administrative Procedure Law', *Dahe Daily*, 05-11-2014.

and the deep-rooted causes may be related to the apparent lack of independence of the Chinese judiciary. Historically speaking, there was no division between the administrative branch and judicial branch in the Chinese tradition, and judges were part of the bureaucracy in ancient China.[366]The system of the People's Congress introduced an authoritarian People's Congress[367] in theory, and the judicial branch is still treated as part of the bureaucracy in socialist China. First, the judges are included in the cadre system, controlled by the Chinese Communist Party (will be discussed in chapter 3). In this sense, the decision whether to hear a case is not so much based on laws, as on the interests of the Chinese Communist Party. Secondly, the courts fiscally depend upon local government, this means it is very difficult for the court to challenge the decisions by local government, even if the decisions contradict the 1982 Chinese Constitution and relevant laws. If local government loses a lawsuit, it may also lose the enthusiasm to give more money to the judicial branch. Against this background, the implementation effect of the amendment allows for no optimism, although the amendment of the administrative Litigation Law 2014 lists some standards of acceptable circumstances, in which cases concerning land selling are involved.

2.3.3.4 Toothless Auditing Storm.

That most Chinese people are familiar with the word "auditing", is not because of the two articles written in the Chinese Constitution roughly referring to the "auditing"; but because of the then General Auditor of the Audit Administration, Li Jinhua (李金华), who launched an auditing storm at the 16th session of the standing committee of the NPC in 2003. The expression "auditing storm" means that Li disclosed, in his statement, some problems relating to the implementation of the 2002 annual budget, and these problems were closely related to the arbitrary spending in the fiscal affairs of central and local government.[368] This is the first time in mainland China that

[366] Gao tong, 'Historical Reflection on the Status of the Judicial Branch', *Journal of Shandong University (Philosophy and Social Science)*, No.2 (2012), 126-133.
[367] Xiao Jinming, 'A Study of the People's Congress and the Chinese Judiciary', *Journal of Yunnan Normal University (Humanities and Social Sciences)*, No.6 (2012), 48-57.
[368] Li Jinhua, 'Work Statement on the implementation of the 2014 Annual Budget in Central Government', http://www.audit.gov.cn/n1992130/n1992165/n2032598/n2376391/2376652.html (accessed on 26-09-2015).

the General Auditor criticized central government and local governments for the extravagance of public spending; some scholars held that the Chinese auditing system was activated by the auditing storm. [369]

However, the problems presented by Li Jinhua, were just a small part of evidence of something largely hidden, but were not taken seriously in practice[370]; the disclosure of fiscal problems did not influence the exercise of power in local finance, e.g. the unlimited power in land finance. Reasons may include the ambiguity of the system itself, as discussed in the theory section, and the dependency of the auditing administration upon the administrative body, and the People's Congress. The 1982 Chinese Constitution does not authorize auditors or the Audit Administration to penalize relevant officials, or to commence a lawsuit in the people's court. In fact, the Chinese Audit Administration is attached to the central government, and its offices in the provinces are attached to local government, thus, they depend on central government or local government for funds, and on the People's Congress for personnel appointment.[371] These combine to invalidate the independent auditing announced in Chinese theory. But the most important thing is that the auditing system always works as the tool of the Chinese Communist Party to carry out the party policies. For instance, the auditing system is considered as being an important approach to pushing the anti-corruption campaign, which was recently launched by the Chinese Communist Party[372], since the focus of auditing has been on the potential corruption arising from selling the use right of state-owned land in developing land finance[373], other problems, including whether the money is spent in line with public demand, has not been the focal point. Thus, the auditing

[369] Wang Baochang, 'To Welcome the spring of Auditing in Mainland China: Reflections on the Auditing Storm', *Money Magazine (Li Cai Za Zhi)*, No.1 (2005), 55-57.
[370] Zhang Zicheng, 'Constitutional Reflection on the Auditing Storm', *Studies in Law and Business*, No. 5 (2005), 20-24.
[371] Shi Yanying, 'How to Deal with Relations between the People's Congress, People's Court and Administrative Body', *ShanDongRenDaGongZuo*, No.10 (2010), 9-10.
[372] Peng huazhang, Liu Xiaojing & Huang Bo, 'A Study of Approaches Pushing Anti-Corruption through Auditing', *Auditing Research*, No.4 (2013), 65-70.
[373] Ye Jianping, 'What Auditors Should Pay Attention to in terms of Land Finance?', *Report on Current Events*, No. 10 (2014), 18-19.

mechanism which may make local government accountable for their decisions in land finance, is turned into a governing tool employed by the Chinese Communist Party to support its superiority.

2.3.3.5 Formal Disclosure of Fiscal Information.

As discussed in 2.2.7, the 1982 Chinese Constitution does not include any provision on the freedom of information, and the Regulation on the Disclosure of Government Information (*zhengfuxinxigongkaitioanli*, 政府信息公开条例) by the State Council, provides some general requirement in this field. According to the Regulation, fiscal information is included as a category which should be published unconditionally.[374] In a sense, fiscal information represents the concretization of governmental actions. The more information local government discloses, the more transparent the power process becomes. In the Chinese context, the disclosure of fiscal information is still at an early stage, and citizens do not have enough access to fiscal information, the majority of which is still kept secret. Although the Budget Law 2014 includes several provisions about the disclosure of budgetary information, the disclosed information, published in the official website of local government, is too concise for common citizens to correlate the figures with administrative actions[375]. Take the city of Xinxiang (新乡) for instance. The official website of the city published fiscal information on revenue and expenditure in August 2014, which records that "the overall revenue in August 2014 amounts to 95.5 hundred million, growing by 9 per cent; tax revenue comes to 67.6 hundred billion, growing by 3.2 per cent, and off-tax revenue to 27.9 hundred billion, growing by 26.1 per cent; the overall expenditure amounts to 164.1 hundred million, growing by 15.6 per cent[376]". Local government in Xinxiang outlines the fiscal situation in August 2014 with 8 figures, the 8 figures provide no detailed information about how the money is collected and where the money is spent. After reading the

[374] See the article 10 of the Regulation on the Disclosure of Government Information.

[375] Dong Yan, 'Difficulties and Approaches: Reflections on the Disclosure of Fiscal Information in the Chinese Government', *Journal of Northwestern Polytechnic University (Social Sciences)*, No.2 (2012), 7-11 & 33.

[376] See the official website of the City of Xinxiang at http://www.xxczj.gov.cn/html/czsj/20140909/15977.html (accessed on 20-09-2015).

so-called fiscal report, the people have no idea about the amount local government spends on the education, health care, or on the amount obtained from land finance, and local tax. Thus, formal disclosures of this kind, are arguably meaningless in pushing the transparency of local government.

In fact, local government seemingly manage to avoid the disclosure of relevant documents for the following reasons. First, the information, controlled by local government, is always regarded as being a power badge, and the disclosure may influence governmental authority[377]; secondly, officials are afraid that the more information the people know, the fewer interests they may get from land finance[378]. The disclosure of fiscal information is also regarded as being an approach to anti-corruption,[379] which would be a major political task of the Chinese Communist Party at the present time.[380] Thus, the disclosure of fiscal information, being currently at an early stage, may be pushed by the Chinese Communist Party.

2.3.3.6 A Challenge to Central Government.

In the expansion of land finance, local government challenge the central government again and again, which touches on the crucial subject of Chinese Reform and Opening-Up, that is, how to retain central authoritativeness. In the Chinese context, central authoritativeness is a politicalized concept, which means that "the central" enjoys exclusive prestige and coercive power.[381] According to Deng Xiaoping, "the central" refers to the Central Committee of the Chinese Communist Party (*zhongguogongchandangzhongyangweiyuanhui*, 中国共产党中央委员会)

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377 Liu Qing, 'Issues and Countermeasures about the Disclosure of Fiscal Information', *Reform and Opening-Up*, No.20 (2011), 80-81.

378 Zhang Zicheng, *Constitutional Reflection on the Auditing Storm*, 20-24.

379 Guo Chuangrui, 'A study of the Freedom of Information: a Perspective of Anti-Corruption', *Legal System and Society*, No. 4 (2008), 232-233.

380 Xi Jinpin, An Address at the Second Plenary Session of the 18th Central Committee of Central Commission For Discipline of the Chinese Communist Party (online), http://politics.people.com.cn/n/2013/0122/c1001-20289699.html (accessed on 18-09-2015).

381 Lv Tingjun, 'The Constitutional Dimension of the Central Authoritativeness', *Journal of Beijing Administrative College*, No.4 (2011), 21-26.

and the State Council[382], thus, to retain central authoritativeness is to intensify the authority of Central Committee of Chinese Communist Party and State Council. In the Chinese context, the ruling of the Chinese Communist Party is based on policies, rather than laws[383]; thus, to intensify the authority of central committee of the Chinese Communist Party and the State Council, is mainly to consolidate the authority of policies by them.

In fact, the introduction of the revenue-sharing scheme was based on the policies of the Chinese Communist Party[384], although it has been written in the Budget Law. The blue print of the scheme was first presented in the 13th National Party Congress of the CCP (*zhongguogongchandangdishisanjiequanguodaibiaodahui*, 中国共产党第十三届全国代表大会) in 1987, and the resolution paper of the scheme was finally passed in the third plenary session of 14th National Party Congress of the CCP (*zhongguogongchandangdishisijiequanguodaibiaodahuidisancizhongyangquantihuiyi*, 中国共产党第十四届全国代表大会第三次中央委员会) in 1993[385]. It was in the light of the resolution paper that the State Council launched the revenue-sharing scheme by issuing series of administrative documents[386] and holding rounds of negotiations with local government[387]. To some degree, the Budget Law 1994 merely demonstrates the legitimacy of the revenue-sharing scheme, for the five measures of the scheme (see 2.3.2.1) are not included in the Budget Law, except for the general announcement that "the state adopts revenue-sharing scheme".

Against such a backdrop, fiscal relation between central and local governments has been based on the negotiation mechanism[388] which leads to a political settlement, rather than a legal

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382 Deng Xiaoping, *Selected Works of Deng Xiaoping*, (Beijing: People's Publishing house 1993), 161.
383 Dong Yan, *Difficulties and Approaches*, 7-11&33.
384 ibid
385 Zhang Qianfan, 'Centralization and Decentralization----Problem, Experience and Approach in China', *Tribune of Political Science and Law*, No.5 (2011), 96-103.
386 Liu Jianwen, *Reconstructing the Law of Property: A New Concept of Finance and Tax Law*, (Beijing: Law Press China 2009), 93.
387 Xiang Huaicheng, 'The Retrospection and Prospect on the Revenue-Sharing Scheme', *Journal of Wuhan University (Social Sciences Edition)*, No. 1(2004), 6-12.
388 Ling Zhijun, *Ups and Downs*, 189-192.

counterpart in times of collision. What is more, there is no effective scrutiny on the implementation of policies, thus, whether or not the policies have been strictly carried out by local government cannot be discovered by the central government in time. In terms of fiscal expansion, there have been unanticipated countermeasures from local government[389], including: (1) setting aside policies from the central government; (2) misinterpretation or even distorting central policies, laws and regulations. It is difficult for the central government to perceive the countermeasures immediately, and it does nothing to counterattack. [390] Thus, central authoritativeness suffers the unprecedented challenges from local government[391].

2.4 Conclusion.

Based on this exploration of Chinese theory and practice in respect of fiscal power in local finance, there is an obvious gap between the rudimentary accountability mechanisms written in the Chinese Constitution and the arbitrary power exercised in the expansion of land finance. The primary theories become totally irrelevant in the practice of power, and the accountability mechanisms seemed to have become sidetracked in the development of land finance. It seems that the questions at issue are generated from the contradictions between the theories as contained in the 1982 Constitution, and the reality of the exercise of power. But what is interesting is the question of what causes these inconsistencies, and why do they fail to be noticed by the (albeit) imperfect accountability mechanisms in the Chinese power process?

Chinese theories on the mechanism of power in local finance have some inherent defects. The 1982 Chinese Constitution contains some articles which are deficient in terms of an accountability mechanism, and the theoretical formulations are vague and impractical, providing

[389] Ling Zhijun, *Ups and Downs*, 189-192.
[390] ibid
[391] Ou Shujun, 'Visible Constitutionalism: Exploring the Constitutionalism through the Allocation of Fiscal Power', *Peking University Law Journal*, No. 5 (2012), 112-135.

no details about how to implement the clauses in political practice. Consequently, they become political declarations, rather than central to the constitutional systems. Furthermore, the implementation of the Chinese Constitution is the responsibility of the People's Congress and its standing committee, which is responsible for the interpretation of the constitutional systems and the supervision of the constitutionality of administrative acts in mainland China. People's Congress and its standing committee are the legislative bodies, they have congress once a year (the rough session is fifteen days in the NPC, and seven days in the local levels). So, the supervision essentially means reading the work statements compiled by the administrative bodies. It is clearly inadequate to supervise the constitutionality of the practice of power simply on the basis of a working report, and it is unlikely that anyone would admit to an unconstitutional act in a work statement. Even if the administrative branch acknowledges unconstitutionality, People's Congress and its standing committee can only repeal some unconstitutional laws or administrative regulations in the light of the Chinese Constitution; as for the unconstitutional acts, People's Congress can do nothing to halt them.

Generally speaking, the drawbacks in the constitutional systems may lead to problems in the power process, but do not necessarily lead to the total failure or subversion of the mechanics of power in practice. In terms of the fiscal situation in local government, the "revenue-centralizing and expenditure-decentralizing" process resulting from the revenue-sharing scheme, produced fiscal difficulties in local finance; and the failure of the transfer payment system undoubtedly added to this fiscal dilemma. However, problems arising from the arbitrary expansion of land finance are not necessarily an inevitable result of the fiscal difficulties. If the budget report was really examined in the light of even the rudimentary democratic accountability mechanisms, and if the exercise of power --- like the infringements of human right in forced evictions, was frequently challenged in the people's court in accordance with the administrative law, land finance in Chinese local government could not grow without restriction. In fact, Chinese theories in the mechanics of power have been set aside in the expansion of land finance, and the Chinese

Communist Party stands indicted for the failure of the primary accountability mechanisms. The Chinese ruling party dominates the People's Congress with various methods, directs the people's court and the auditing system, and the disclosure of the fiscal information in local government serves merely for the anti-corruption campaign launched by the Chinese Communist Party. Therefore, accountability mechanisms written in the Chinese Constitution are actually controlled by the Chinese Communist Party. Practical examples of how the Chinese Communist Party successfully controls the power process in mainland China, and each of the rudimentary accountability mechanisms, will be explored in Chapter three; in this process, reasons for the failure of the imperfect accountability mechanisms in the expansion of land finance, and the inconsistency of the Chinese theories and the power process, will be further explored from a practical perspective.

Chapter 3: Exploring the Real Chinese Mechanisms of Power in Local Finance.

3.1 Introduction.

This chapter is intended to explore the real mechanics of power in Chinese local finance. According to chapter 2, the 1982 Chinese Constitution provides a set of basic but inadequate accountability mechanisms to oversee the exercise of powers in terms of local fiscal affairs. But the Chinese theories were formulated with some inherent defects, i.e. the ambiguity of provisions and the lack of implementation mechanisms. In practice, Chinese local government are expanding their fiscal sources fiercely and unrestrictedly, and social problems are produced as a result of the lack of control on the exercise of powers. Thus, the theoretical mechanisms which may hold local government to account for their fiscal decisions, seem to be of no effect in the real exercise of power, and the Chinese constitutional theories on local government fiscal power seem to be at best, set aside in the expansion of land finance. These problems together with their theoretical location within the Constitution, may give rise to a preliminary conclusion that there exists a discrepancy in Chinese local finance between constitutional theories and practice, and that issues with regard to unlimited power in local finance may be rooted in this contradiction.

The question that needs to be addressed is ‘what are the results of the inconsistency between the imperfect accountability mechanisms written in the Chinese Constitution, and the unrestricted fiscal power in land finance, and what is it that really determines the Chinese power process in local finance?’ This chapter will explore the operational power mechanisms in respect of local finance in the Chinese context, and in the process, the chapter will look to causal elements in the inconsistencies between the constitutional institutions and real power process concerning fiscal power in local government.

Chinese state apparatus, including the People's Congress, the administrative branch, and the judicial branch, are firmly dominated by the CCP, the only ruling political party in mainland China. Thus, the exploration of practical power mechanisms will centre on the control of the CCP over the power process, or, on the leadership of the CCP (the typical mainstream discourse in mainland China). The dominance of the CCP affords comprehensive control over state power, even Chinese society, thus, this examination will include a review of the general controlling mechanisms, which are realized through the communist domination over the legislative, administrative, and judicial bodies, and the specific power mechanisms in local finance, which actually contribute to the fiscal expansion in the name of land finance. In the process, the chapter will also look at how the imperfect accountability mechanisms written in the Chinese Constitution work in the real process of the exercise of power.

3.2 General Power Mechanisms in Chinese Practice.

Professor Zhang Qianfan (张千帆) once said that Chinese state power, is not controlled in the ways spelled out in the 1982 Chinese Constitution or relevant laws, but in a set of implied rules, called "latent rules[392]", or "political conventions[393]", or "informal institutions[394]", which cannot be found in any law books[395]. The three concepts, "latent rules", "political conventions" and "informal institutions", are all implied expressions in the Chinese context, pointing to unique power mechanisms. Broadly speaking, the Chinese power process is overwhelmingly controlled by the CCP; the CCP's influence has permeated through all aspects of Chinese society[396],

[392] In China, the wording "latent rules" is coined by Wu Si (吴思), in *Latent Rules: Real Games in the Chinese History*, to refer to rules which have practical effects but cannot be found in state laws, quoted from Zhang Qianfan, *The Constitution of China: A Contextual Analysis*, (Oxford: Hart Publishing 2012), 98.

[393] Yu Zhong, 'Political Convention: A Kind of Political Customary Law outside the Written Constitution', *Journal of Politics and Law*, No.11 (2009), 51-57.

[394] Chen Zhenghua, 'A Study of the Formal and Informal Systems in the Power Allocation between Central and Local Governments', *Law Science Magazine*, No.5 (2008), 139-141.

[395] Zhang Qianfan, *The Constitution of China: A contextual Analysis*, (Oxford: Hart Publishing 2012), 122.

[396] Su Li, 'Exploring the Political Party in Chinese Judicial System', *Legal and Social Science*, Vol.1 (2006), 256-284.

although the wording "party-state" is not officially recognized or employed by Chinese mainstream discourse.

In China, the concept of "party-state" was created by Sun Yat-sen (孙中山, 1886-1925), the first president of the Republic of China(*zhonghuaminguo*, 中华民国), and it was used to specifically refer to the integration of the Republic of China and a political party, the Nationalist Party(*guomindang*, 国民党). According to Sun, the Nationalist Party was set up with a mission of rescuing Chinese people from the feudalism and colonial rule, and of founding a democratic republic governed by the same party[397]. In the process, Chinese people should be enlightened by the Nationalist Party with democratic theories, and the state should be integrated with the party on a basis of the "three people's principles (*sanminzhuyi*, 三民主义)"[398], including nationalism, democracy and the people's livelihood[399]. The three people's principles, in accordance with Sun, should be realized through the introduction of constitutional and parliamentary practices, which is the meanings of *republic* in Sun's understanding.[400] When giving a lecture commemorating the 100th Anniversary of the Revolution of 1911 at Peking University, Professor Zhang Qianfan argued that the Republic of China founded by Sun Yat-sen should be called "the first Republic", and the People's Republic of China should be "the Second Republic"; however, neither the first nor the second accomplished a genuine *Republic* worthy of the name.[401] From the viewpoint of Su Li(苏力), the Nationalist Party never united different regions in mainland China, because local forces were essentially in power in the northeast China and Shanxi(山西) Province; hence, the Republic of China was never a genuine "party-state"[402]. However, in terms of the impact and

[397] Yang Deshan, 'An analysis on Sun Yat-sen's Party-State System', *Teaching and Research*, No. 3 (2007), 75-81.
[398] Sun Yat-sen, *Complete Works of Sun Yat-sen*, (Beijing: Zhonghua Press 1986), 103-104.
[399] ibid
[400] Gui Hongcheng, Dr. Sun Yet-sun's Ideas of "Minquan","Minzhu" and "Gonghe", *National Policy Foundation Research Report*, (online), http://old.npf.org.tw/PUBLICATION/IA/095/IA-R-095-002.htm.
[401] Zhang Qianfan, *The Revolution of 1911 and the Chinese Constitutionalism*, a Lecture Delivered in Peking University to commemorate the 100th Anniversary of the Revolution of 1911(online), http://v.youku.com/v_show/id_XNDg0MDUyMDU2.html (accessed on 19-09-2015). For political reasons, the video of the lecture is forbidden to be accessed in mainland China.
[402] Su Li, *Exploring the Political Party*, 256-284.

control on the whole nation, the CCP, the sole political party in power since 1949, has outdistanced the Nationalist Party[403].

Chinese official discourse, "the leadership of the CCP", at least in a degree, reveals the real power mechanisms in mainland China, that is, the absolute control of the CCP over Chinese power process. However, it is interesting that no specific provision, written in the 1982 Chinese Constitution, materializes and institutionalizes "the leadership".[404] Thus, the legitimacy of "the leadership" has been a crucial issue, at least for legal scholars. According to Mo Jihong (莫纪宏), the legitimacy of CCP's leadership, roots in the historical process of the establishment of Chinese regime[405]. Gong Tingtai (龚廷泰) expressed similar opinion that "the leadership of the CCP" was supported by a kind of substantive legitimacy originated from the consent of Chinese people in the establishment of China[406]. Jiang Zemin (江泽民) even argues that it is the Chinese people who choose the CCP to be the ruling party in mainland China, and the choice is an unqualified correct one stemming from the Chinese revolutionary practice.[407]In terms of the reasons why the Chinese people make the historical and essential choice, the representative reasoning pattern includes three points:

> (1) The CCP is a political party armed with the Marxism and Maoism, which are said to be proved to be correct in the Chinese revolutionary course[408];
>
> (2) The CCP is the only faithful representative of the interests of Chinese people of all ethnic groups[409];

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[403] ibid

[404] Shi Wenlong, 'To Control Political Power by Law and Institutionalize "the Leadership of the CCP" Written in the Preface of the Constitution 1982', *Oriental Law*, No.5 (2011), 76-82.

[405] Mo Jihong, 'On the Evolution of the Constitutional Status of the Ruling Party', *Legal Forum*, No.4 (2011), 48-53.

[406] Gong Tingtai, 'A Jurisprudential Consideration on the Legality of the ruling of Chinese Communist Party', *Chinese Law Science*, No.3 (2005), 33-41.

[407]Jiang Zemin, An Address to celebrate the 40th Anniversary of PRC (online), http://news.xinhuanet.com/ziliao/2005-02/23/content_2608708.htm (accessed on 08-09-2015).

[408] Gao Quanxi & Tian Feilong, 'Consultation and Delegation: the Constitutional Role of the CCPC and Its Vicissitude', *Journal of East China University of Politics and Law*, No.5 (2013), 143-154.

[409] ibid

(3) The CCP undertakes the extremely important mission of socialist construction in mainland China.[410]

As for how the Chinese people choose the CCP to be the ruling and leading party in China, Jiang fails to present a detailed argument, neither do other Chinese scholars. A recent view argued that the CCP should observe the 1982 Chinese Constitution, and should not depart from constitutional principles, so as to consolidate the legitimate dominance over state power[411], and the argument is rooted in the context that Chinese power is usually used as an instrument in seeking self-interests by some officials.[412] When addressing the second session of the eighteenth Central Commission for Discipline Inspection of the CCP(*zhonggongzhongyangjilvjianchaweiyuanhui*, 中共中央纪律检查委员会) in January 2013, Xi Jinping (习近平), held that power should be confined to the cage of institutions, and restrictions and scrutiny should be imposed upon Chinese power process[413]. What Xi said had, at least, implied that Chinese state power was not curbed by the 1982 Chinese Constitution in the power process, although he failed to explain clearly what kind of institutions should be established as a *cage*. Reading between the lines, the hidden meanings reveal, to some degree, the Chinese power reality.

3.2.1 The Dynamics of Power and Control.

This section provides some general prevailing ideas as to the mainstream position of the CCP in its control over Chinese power process. These ideas should not be seen as specific measures (will be discussed in 3.2.2) through which the CCP imposes its dominance upon the exercise of public powers; they just provide a guideline on how to realize the leadership. As discussed in chapter 1, this thesis in intended to be focused on the operation of fiscal power in the expansion of land

[410] Gao Quanxi & Tian Feilong, *Consultation and Delegation*, 143-154.
[411] Yu Zhong, *Political Convention: A Kind of Political Customary Law*, 51-57.
[412] Tong Zhiwei, How to Cage Powers with an Institutional Cage? (online) http://cn.nytimes.com/opinion/20130227/cc27tongzhiwei/ (accessed on 13-09-2015).
[413] Xi Jinping, *An Address in the Central Commission for Discipline Inspection (online)*, http://legal.china.com.cn/2013-01/23/content_27767310.htm (accessed on 01-09-2015).

finance in mainland China, and the guiding ideology of CCP in this area could not be avoided, due to its causal connection to the substantial control in practice.

As early as 1990, Jiang Zemin, the then General Secretary of the CCP, maintained that the CCP should have command over all state organs, including the People's Congress, the administrative branch, the judicial branch and the army, by controlling the political orientation, ideology and cadre system[414]. Based on Jiang's argument, the operation of real power in China lies in a dynamic process, through which the Chinese state power is shadowed entirely by the CCP, and the political orientation, ideology and cadre system are the main aspects, on which the CCP focuses. The political orientation, ideology and cadre system, are frequently cited concepts in the Chinese context, but the concepts are mostly assumed to have some tacit understanding, for no further interpretations on the concepts are provided. Therefore, the implications of the concepts are deduced mainly from addresses by the senior leaders of the CCP, and partly from editorials of Renmin Daily (人民日报), the most authoritative and influential newspaper, serving as the mouthpiece of the CCP.

3.2.1.1 Political Orientation.

Political orientation is also called political correctness, which is a matter of primary importance in Chinese power practice. According to series of editorials published after the fifth plenary session of the seventeenth central committee of the CCP (*zhongguogongchangdangdishiqijiezhongyangweiyuanhuidiwucihuiyi*, 中国共产党第十七届中央委员会第五次全体会议) held in 2010, correct political orientation may be defined as "to adhere to the socialist political road with Chinese characteristics; to integrate 'the leadership of the CCP', and 'the people being masters of the state' with the socialist rule of law; to carry forward the reform of Chinese political system in a positive and sound manner; to boost the self-

[414] Jiang Zemin, *To Uphold and Improve the System of People's Congress (online)*, http://news.xinhuanet.com/ziliao/2005-02/18/content_2592031.htm (accessed on 05-09-2015).

perfection and self-development of Chinese socialist political system". Thus, four main points are underlined as the criterion for testing whether political correctness stands or not, but only the "leadership of the CCP" is relatively straightforward, all the other points seem to connect directly with the socialist political system with Chinese characteristics. It should be noted that the leading of the CCP, in other words the leadership of the CCP, is regarded as being the core of socialist political system with Chinese characteristics, and this has been self-announced by the CCP again and again since the establishment of the People's Republic of China in 1949. Thus, the foundation of the so-called political correctness is whether the CCP enjoys supremacy in the political process, and controls the power mechanisms.

3.2.1.2 Ideology.

Ideology is just the abbreviation of socialist ideology, which is considered to be related closely with the innate character of socialism[415]. What is the socialism like, or what is the innate character of socialism? Different General Secretaries of the CCP have different formulations. Mao Zedong (毛泽东) once maintained that socialism, in essence, was a class struggle between the capitalist class and the proletariat[416]. In the deepening of the Reform and Opening-Up, Deng Xiaoping (邓小平) gave a new interpretation of the essence of socialism during his Southern Tour in 1992. Deng said that the nature of socialism rested with the emancipation and development of socialist productive forces; abolishing the exploitation system; removing the existing gap between the rich and the poor; and achieving common prosperity.[417] Deng's Southern Tour is regarded as being a landmark which entrenched the Reform and Opening-Up after the Tiananmen Square Demonstrations in 1989[418], and his argument lays a foundation for the reform of Chinese

[415] Yuan Guiren, 'The Essence of Socialist Ideology', Renmin Daily, 21-04-2008.

[416] Lei Yun, 'A Study of Mao Zedong and Socialism the Chinese Characteristics', *Studies on the Socialism with Chinese Characteristics*, No.6 (2013), 34-39.

[417] Shang Qingfei, 'A Study of Deng Xiaoping's Contributions to the Socialism with Chinese Characteristics', *Journal of Nanjing University (Philosophy, Humanities and Social Sciences)*, No.5 (2014), 7-14.

[418] After Tiananmen Square's Demonstrations in 1989, there were controversies within the high-level leaders of the CCP in terms of whether to uphold the Reform and Open. Someone insisted to abandon the policy due to the negative influence of such Western ideas as democracy, and Reform and Opening-Up slowed down. Deng argued for the policy, but he had

economic system. Based on Deng's version of socialism, in 2007, Hu Jintao, employed the "socialist road" as a conceptual instrument to re-define socialism. Hu held that the socialist road is to build China into a thriving and powerful, democratic, culturally advanced, and harmonious country with socialist market economy, socialist democracy, and socialist advanced culture; in the process, four cardinal principles (referring to adherence to socialist road, adherence to proletarian dictatorship, adherence to the leadership of the CCP and adherence to Marxism and Maoism, which are presented by Deng Xiaoping in 1979. Deng required that the four principles should not be questioned within the CCP), and Reform and Opening-Up should be upheld to emancipate and develop the productive forces, as well as to consolidate and perfect socialism. Hu's version is regarded as the most comprehensive one[419] in elucidating the nature of socialism. Compared with Deng's version, there are some repetitive concepts in Hu's argument, e.g. four cardinal principles and the leadership of the CCP; besides, the precise meanings of socialist market economy, socialist democracy, socialist advanced culture, remain fairly vacuous largely because their meaning have not been defined, or at least, the common determiner of the concepts, "socialist", is an alternative of "the leadership of the CCP". Therefore, in terms of Hu's idea of the socialist road, "the leadership of the CCP" works as a roadbed and the other concepts are layers of pitches to harden the road.

From the "socialist road", Hu moved on and presented a new concept, the socialist core value(*shehuizhuyihexinjiazhitixi*, 社会主义核心价值体系), to illuminate socialist ideology. According to Hu, the socialist core value demonstrates the intrinsic quality of socialist ideology[420], and may be summarized as Marxism, common ideal, national spirit and zeitgeist[421].

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retired at that time and could not control consensus propaganda of the CCP, so his argument could not be published in Beijing. Against the circumstances, Deng went to the southern provinces, and expressed his political opinions to feel out Beijing's attitude. Local newspaper of Guangdong(广东) and Hunan(湖南) published Deng's article, and Renmin Daily reprinted it a few days later, which released a signal that Deng's opinions prevailed, although Jiang Zemin was in power. After that, Deng became the *defacto* hierarch in China, and Reform and Opening-Up was re-implemented and deepened.

[419] Jiang Zemin, *To Uphold and Improve the System of People's Congress (online)*, http://news.xinhuanet.com/ziliao/2005-02/18/content_2592031.htm (accessed on 13-09-2015).

[420] Hu Jintao, 'Statement at the 18th National Congress of the CCP', Renmin Daily, 09-11-2008.

[421] Yuan Guiren, 'Constructing the Socialist Core Values', *Social Sciences in China*, No.1 (2008), 5-10.

To be specific, Marxism underpins the socialist core value as a fundamental guidance[422]; common ideal refers to the fulfilment of a socialist country with Chinese characteristics[423]; national spirit means that all citizens should devote themselves to the construction and development of the socialist country[424], which forms the main body of Chinese patriotism[425]; zeitgeist is mainly represented by reform and innovation,[426] amongst, the Reform and Opening-Up dominated by the CCP is the ultimate reform or innovation in China. Based on the four aspects, the socialist core values, or the socialist ideology, calls on the Chinese to commit themselves to socialist cause with a sublime feeling, and Chinese socialist cause should be led by the CCP.

In fact, the four factors, Marxism, common ideal, national spirit and zeitgeist are just substitutes for "the leadership of the CCP", and there is no fundamental distinctions between "the leadership of CCP" and socialist cause, or socialist ideal, or socialist construction, or socialist country, for the CCP acts as the core leadership in the construction of socialist cause. The propaganda department of the CCP (*dangweixuanchuanbu*,党委宣传部) takes charge of ideology, and the most significant function of the propaganda department is to guarantee that the Chinese cultural products, including press coverage, publications, movies, TV programmes, and so on, do not contradict socialist ideology. The main method usually employed by the propaganda department is in the name of press censorship(*xinwenshenchazhidu*, 新闻审查制度), although the CCP never acknowledges the existence of it. There is no journal article exploring press censorship in China, but specific social events always reveal the continual reinforcement of press censorship in a

[422] Yang Fang & Mei Rongzheng, 'Exploring the Relations between Socialism with Chinese Characteristics and Socialist Core Values', *Leading Journal of Ideological and Theoretical Education*, No.10 (2011), 39-43.
[423] Chen Yanbin & Zou Fangming, 'A Study of the Socialist Core Value', *Journal of Nanjing University (Social Sciences Edition)*, No.4 (2008), 15-21.
[424] Yu Yuhua, 'An Examination of the Dominance of Socialist Core Values', *Ideological and Theoretical Education*, No. 1 (2008), 27-32.
[425] Qiu Furen & Li Liang, 'An Outline of the Socialist Core Values', *Studies on Party and Government*, No.1 (2015), 1-7.
[426] Duan Yongqing & Xiao Ke, 'A Study of Zeitgeist centred on the Reform and Innovation', *Journal of Sichuang Normal University (Social Sciences Edition)*, No.3 (2011), 12-19.

subtle way, like the Event of *Southern Weekend*(*nanzhoushijian*, 南周事件) at the beginning of 2013.

A news analyst of *Southern Weekend* (*nanfangzhoumo*, 南方周末), a newsweekly based in Guangdong Province, drafted a keynote essay for its 2013 New Year Issue, and the essay, entitled *The Chinese Dream, the Dream of Constitutionalism*, described the rough process through which the Chinese people sought constitutionalism and expressed a strong desire for the realization of constitutionalism in mainland China. Before publication, the propaganda department of Guangdong Province reviewed the essay, and said the essay contradicted socialist ideology. The officials changed the title into *We are closer to the Chinese Dream at the Moment,* and replaced the *constitutional dream* with the *dream of constructing a rich country*. This event shows that the CCP is much concerned about the concept of constitutionalism, for it may suggest that state power should be exercised in accordance with a Constitution or constitutional law, and this obviously threatens the supremacy of the CCP in political process. Thus, the so-called ideology is merely the supreme status of the CCP in the practice of power.

3.2.1.3 Cadre System.

Successive General Secretaries of the CCP, including Deng Xiaoping, Jiang Zemin, Hu Jintao and Xi Jinping, have all emphasized that the Chinese cadre system should conform to "the leadership of the CCP", which is regarded as being the reflection of official appreciation on Stalin's dictum "cadre decides everything"[427].

According to Lin Xueqi (林学启), the essence of Chinese cadre system lies in the fact that Cadres are guided by the CCP[428], or the CCP guides citizens to select, manage and supervise cadres of

[427] Melanie Manion, 'The Cadre Management system, Post-Mao: the Appointment, Promotion, Transfer and Removal of Party and State Leaders', *The China Quarterly*, Vol. 102 (1985), 203-233.

[428] Lin Xueqi, 'Exploring the Theoretical Foundation of the Principles of the CCP's Responsibility on the Cadre System', *Journal of Chongqing University (Social Science Edition)*, Vol.12 No.3 (2006), 86-90.

governmental department and public organization[429]. Lin's argument does not make clear who can make the final decision; is it the citizen or is it the CCP? In a journal article on the cadre nomination system (*ganburenyongtimingzhidu*,干部任用提名制度) of the CCP, Lin said that the nomination system should reflect the nature of party politics, that is, persons standing for its own interest should be appointed to the leaders of state organs.[430] Lou Yangshen (楼阳生), the minister of Organization Department of Hubei Provincial Committee of the CCP, once held that Chinese cadre system should effectively and promptly respond to the demand and wills of the CCP itself[431]; any attempt to weaken the CCP's control over the cadre system is just to negate the leadership of the CCP[432]. In terms of the nomination and promotion of officials in state organs, party committees of various levels should possess discourse power and the power to make final decision[433]. Lou's article was published in *Qiushi*(求是), the official publication of the CCP, and may be taken as the official stand of the CCP. In fact, the organization department of the CCP is in charge of the cadre system, and different approaches are always used to control cadres in the People's Congress, the administrative and judicial branches, which will be discussed in detail in the following section.

3.2.2 The Route of Chinese Power Practice.

3.2.2.1 Controlling the People's Congress.

As discussed in chapter 2, the system of the People's Congress, which is said to be the fundamental political system in China, is designed to work as a democratic mechanism, with the NPC being the supreme state organ, representing the overall will and interests of Chinese people on a basis of power fusion. In practice, the CCP declares itself to be the vanguard of Chinese

[429] Ma Xin, 'Basic Ideas on the Chinese Cadre system', *Gansu theory Research*, No.4 (2014), 50-54.
[430] Lin Xueqi, 'An Examination of the Cadre Nomination System', *Journal of the Party School of the Central Committee of Chinese Communist Party*, No.5 (2012), 39-42.
[431] Lou Yangsheng, 'Why does the CCP Lead Cadre? How to Lead? And What to Lead? '*QiuShi*, No.1 (2014), 3-7.
[432] Ma Xin, *Basic Ideas on the Chinese Cadre system*, 50-54.
[433] ibid

people, even Chinese nation[434]; and the system of People's Congress is considered as being the manifestation of CCP's political wisdom acquired from long-term political struggle[435]. This widely-spread recognition for the CCP seems to suggest that People's Congress serves merely as an institutional tool, testifying the CCP's sagacity and strengthening the status of the CCP as the vanguard of Chinese people.

The CCP actually controls People's Congress through direct and indirect approaches. The direct control is regarded as being the due course of legislative work, making the ruling party's view into the will of the country scientifically[436], and the indirect control is fulfilled by the cadre system. According to Fang Shirong (方世荣), the direct control of the CCP over People's Congress could be laid out as the following three aspects: (1) the CCP always sets down a guideline for the legislative work of the NPC; examines and endorses draft bills, in order to make sure that the CCP's policy is fully carried out in legislation[437]; (2) when the CCP considers it necessary to amend a law or to enact a new law, the party committee of the CCP at various levels, may submit a legislative proposal directly to People's Congress at the same level[438]. For instance, when the CCP intends to amend the Budget Law, the Central Committee of the CCP submits a proposal and a drafted amendment directly to the NPC, then the NPC puts the proposal and amendment on the agenda of the annual session of the NPC, and turns the proposal into a real amendment during the session. (3) The CCP drafts a law or an amendment in place of People's Congress[439], for example, the Civil Servant Law 2005 was drafted by the Organization

[434] See the constitution of the Chinese Communist Party (online), http://news.xinhuanet.com/ziliao/2002-11/18/content_633225_1.htm (accessed on 06-09-2015).

[435] Dong Lingyi,' Exploring the Status of the Chinese Communist Party as the Vanguard of the Chinese People', *Journal of Shandong Normal University*, No.2 (1993), 18-20.

[436] Fang Shirong, 'Scientific Method Turning Ruling Party's View into Will of the State', *Law Science*, No.7 (2010), 20-27.

[437] Chi Haotian, 'A Statement on National Defence Law', *Bulletin of the Standing Committee of the National People's Congress*, No.2 (1997), 6.

[438] You Xunlong, 'Exploring the Relations between the Leading of the Chinese Communist Party and the Construction of the Legal system', *Journal of Loudi Teacher's College*, No. S1 (1992), 60-64.

[439] Chen Jun, 'An Examination of the Legislative Work under the Leading of the Chinese Communist Party', *Journal of Shanghai Normal University (philosophy& social sciences edition)*, No.2 (2011), 29-39.

Department of the Central Committee of the CCP.[440] It should be noted legislative proposals from the CCP are always approved successfully without questioning at the annual session of the People's Congress, and the democratic process by ballot promised in the 1982 Chinese Constitution becomes a mere formality. Thus, the CCP takes the place of People's Congress in performing legislative authority, and this leads to the formal supremacy and actual vacancy of People's Congress in Chinese power process[441]. The control of the CCP over legislative power, leads to the phenomenon that People's Congress is responsible to the higher authority of the CCP, rather than to Chinese people, or the representatives of Chinese people.

Furthermore, the CCP controls People's Congress in the nomination of the leaders in central and local governments to implement the principle of placing cadre system under the control of the CCP[442]. The party committee of the CCP in various levels recommends, in written form, the candidates of the leaders of People's Congress,[443] and People's Congress always accepts relevant recommendations without question. People's Congress, in the light of the 1982 Constitution, should be the only legitimate body to elect officials of some specific grades, for instance, the head of the administrative branch and the chief judge in local people's court. However, the short list of the candidates is actually dominated by the CCP through the personnel nomination system, that is, the CCP decides the candidates for the head of the administrative and judicial branches. In this sense, the so-called election is just a democratic show directed by the CCP. It is the nomination of the CCP that determines who may be added to and who must be withdrawn from the list. The Chinese state organs are operated on a basis of power fusion (discussed in chapter 2), in fact, the CCP controls the cadre of the legislative, administrative and judicial branches through the nomination system. Against this backdrop, it is impossible (or no need) for People's

[440] Qi Guanghua, 'Reflections on the Civil Servant Law', *Journal of China National School of Administration*, No. 4 (2005), 50-53.

[441] Yi Shiguo, 'Standardizing the Relationship between the CCP and State Organs', *Journal of Yunnan University (law edition)*, Vol.26 No.2 (2013), 18-23.

[442] Fang Shirong, 'Scientific Method Turning Ruling Party's View into the Will of the State', *Law Science*, No.7 (2010), 20-27.

[443] Chen Qiheng, 'A Study of the Criterion of the Nomination System', *Leadership Science*, No. 13(2008), 41-42.

Congress to scrutinize the administrative and judicial branches in accordance with the 1982 Chinese Constitution, for scrutiny may harm the ruling status of the CCP[444].

In addition, a temporary party group is always established during the annual session of People's Congress, and a party group is set up in its standing committee; those are considered as being approaches to a sound interaction and organisational dependence between the CCP and People's Congress[445]. Members of the temporary party group and the party group must submit to the party committee of the same level and carry out unconditionally the target of CCP in the legislative process and the nomination of cadre[446], for as party members of the CCP, they must observe the disciplines of the CCP and their statements and votes should not run counter to the CCP's party policy[447].

What is more, according to the Electoral Law of the National People's Congress and the Local People's Congress (*zhonghuarenmingongheguoquanguorenmindaibiaodahuihedifanggejirenmindaibiaodahuixuanjufa*, 中华人民共和国全国人民代表大会和地方各级人民大会选举法), the maximum amount of the members of the NPC must be limited to no more than three thousand. In fact, more than ninety per cent of the representatives of the NPC are from the CCP[448], and the secretary of party committee always holds a concurrent post of the chairman of the people's congress at the

[444] Du Miao, 'How to Reduce the Trying Situation for the People's Congress in Supervising the Administrative Branch', *Public Administration and Law*, No. 4 (1998), 45-46.
[445] Dong Heping, 'A Study of the Achievement and Weakness of the System of the People's Congress', *Legal Forum*, No.6 (2012), 43-49.
[446] Wang Weiguo, 'The Pivot Method of the Construction of the Political Civilization: Upholding and Perfecting the System of the People's Congress', *Journal of Gansu Education College (social sciences)*, No.1 (2005), 48-50.
[447] Sun Zhe, *A Study of the System of the National People's Congress (1979-2000)*, (Beijing: Law Press China 2004), 65-66.
[448] Liang Tao, 'An Analysis of the Representatives of the People's Congress', *Journal of the Party School of the CCP Qingdao Municipal Committee*, No.2 (2007), 87-89.

same level[449]. Thus, People's Congress works actually as the congress of the CCP in the name of Chinese people.

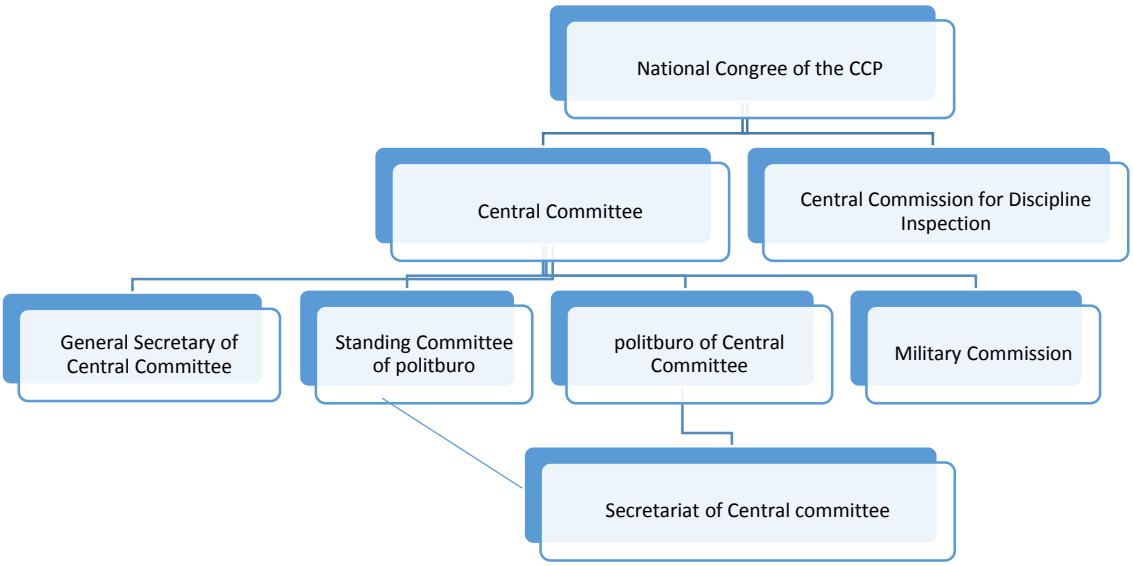
Based on the theory related to the system of the People's Congress, presented in chapter 2, state power in the Chinese context should be organised on a fusion through the People's Congress, and this theory actually facilitates the absolute control of the CCP over state organs through its control over People's Congress. This point has provided a foundation for further comparisons between China and England. In England, state power is also operated on a fusion, but the English fusion is very different with the Chinese fusion, for check and balance are available in power process, which will be discussed in chapter 5.

3.2.2.2 Control over Administrative Branch.

According to the 1982 Chinese Constitution, the administrative branch should work as the executive body of People's Congress. In fact, it is the CCP, the ruling party in China that retains the final word to make decisions in social development, economic systems, appointing officials, etc. All state organs in mainland China, are working as the executive bodies of the CCP, and the administrative branch makes no exceptions. The CCP controls the administrative branch mainly through the party committee, which is narrowly organized, and parallel to Chinese governmental levels. Thus, it is difficult, or unnecessary, to draw a clear line between the jurisdictions of the party committee and that of the administrative branch[450], for they are always mixed as a whole, although the 1982 Constitution does not empower the CCP to do so. In the central level, the composition of the party committee of the CCP is shown in the figure as follows:

[449] Fang Shirong, *Scientific Method*, 20-27.

[450] Zeng Zhiyun, 'A New Perspective for the Relations between the Chinese Communist Party and the Government: the Chinese Communist Party Leads, and the Government Manages', *Journal of Changchun Institute of Technology (Social Science Edition)*, No. 3(2011), 15-17.



The National Congress of the CCP, a body of around 2000 party members[451], which is elected for a term of five years, holds a meeting every five years to lay a five-year plan for China, and to elect the Central Committee (*zhongyangweiyuanhui*, 中央委员会) containing around 200 members[452]. The General Secretary of the Central Committee, may continue to hold office for five more years when re-elected, but he or she cannot serve for more than two consecutive terms [453] . The Central Committee and the Central Commission for Discipline Inspection(*zhongyangjilvjianchaweiyuanhui*,中央纪律检查委员会) are parallel bodies directly under the National Congress of the CCP. The Politburo of Central Committee and its Standing Committee,[454] substitutes the Central Committee itself in performing official powers during inter-sessional period[455]. Seven members[456], including the General Secretary and senior leaders

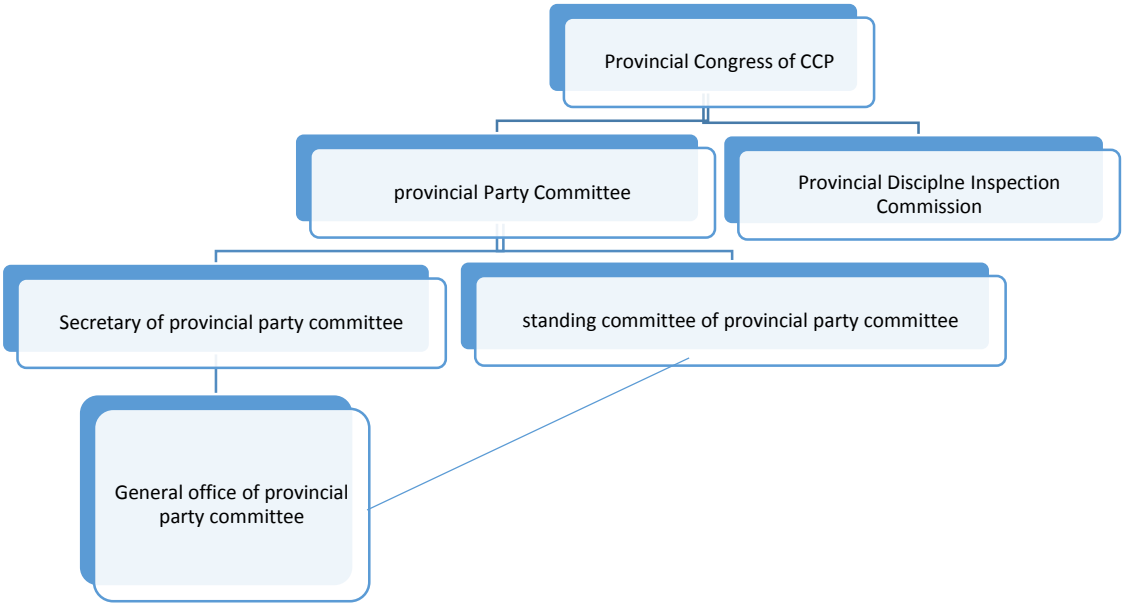
[451] The 18th National Congress of CCP, which was held in 2012, comprises 2270 party members.
[452] The current Central Committee has 205 members.
[453] The constitution of the CCP does not offer a definite formulation about the terms of office for the General Secretary of the Central Committee. From 1956 to 1976, Mao Zedong had been holding the post of General Secretary for 20 years, which was then called the President of the CCP. After Mao's death, a view that lifelong official system should be cancelled prevailed within the CCP, and was adopted by the Chinese Constitution 1982. However, that holding the office of General Secretary cannot overrun two consecutive terms, or 10 years, is not fixed as a political convention of the CCP until Hu Jintao Administration.
[454] The current Politburo consists of 25 members.
[455] See the article 22 of the constitution of the CCP.
[456] The Standing Committee was always composed of 9 members, but members of the current Standing Committee reduced to 7 without further explanation from the CCP.

from the State Council and the military[457], comprise the current Standing Committee of Politburo, which is always announced as the manifestation of the collective leadership of the CCP. Some scholar even name the Standing Committee of Politburo after the "collective presidential system", which is regarded as being the most democratic and efficient political system[458]. In line with the constitution of the CCP, the Standing Committee of the Politburo should be elected within the Central Committee of CCP[459]. The Secretariat of the Central Committee(*zhongyangshujichu*, 中央书记处) works as the standing body undertaking the routine work of the Politburo and its Standing Committee.

The Central Commission for Discipline Inspection is in charge of the party discipline of the CCP, and the main instrument of discipline inspection is commonly referred to as "*shuanggui*(双规)", that is, "to report problems within a *prescribed time* and in a *prescribed place*", if a party member is informed against as violating party disciplines[460]. "*Shuanggui*" means a party member can be detained and interrogated according to the party discipline of the CCP before the involvement of judicial authority; in this sense, party discipline works as an alternative to laws. Besides "*shuanggui*", an active inspection called "inspection tour (*xunshi*, 巡视)" seems to play a more and more vital role in *hunting "big tigers"* in the anti-corruption campaign initiated by the CCP. In 2013, two round of inspection tours have been carried out and 17 officials at provincial or ministerial level have been detained[461].

In the provincial level, the structure of the party committee of the CCP is shown as follows:

[457] In the Chinese political practice, the General Secretary of the Central Committee always works as the supreme commander of the military and the President of the country.
[458] Hu Angang, The Chinese Way to Success: Collective Presidential System, Much More Democratic and Efficient, Renimin Daily (Overseas Edition), 03-07-2012.
[459]See article 22 of the constitution of CCP.
[460] See article 28 of *Work Rule of Commission for Discipline Inspection*.
[461] See Legal Evening News, 31-12-2013.



Unlike the National Congress of the CCP, which is always held every five years to initiate the general tasks for the whole period, provincial congress of the CCP is always held twice per year to deliberate some specific jobs which should be tackled within its jurisdiction. In most provincial party committees, the membership of the standing committee is always thirteen, an odd number for easy decision-making. Members of the standing committee of the provincial party committee should include leaders from the organization department, the propaganda department, the army, the politics and law committee, and the provincial discipline inspection commission. Although this has not been written in the constitution of CCP or any official document, it still exerts actual influence upon CCP's political practice. The organizational structure of the CCP works according to a top-down mechanism,[462] that is, local levels submit to the central level unconditionally, in other words, "the lower level of the party committee should obey the higher level of the party committee, and all party members and party committees should obey the Central Committee(*xiajifucongshangji quandangfuconghongyang*, 下级服从上级,全党服从中央)".

[462] Su Li, *Exploring the Political Party*, 256-284.

During the period between 1956 and the commencement of the Reform and Opening-Up in 1978, there was no separation between party work and administrative work in China, and the situation was called "the party committee system (*dangweifuzezhi,*党委负责制)". Under the party committee system, the party committee of the CCP at various levels shared the same work place and personnel with the administrative branch, which was called "one agency two titles(*yitaojigouliangkuaipaizi*, 一套机构 两块牌子)". Official documents were always co-signed by the party committee and the administrative body, and the governor of the administrative department should be obedient to the secretary of party committee of the CCP at the same level (most of the time, the secretary of party committee of the CCP held a concurrent post of the governor of the administrative department anyway).

Since the Reform and Opening-Up, relations between the party committee and the administrative branch became one of the key issues of Chinese political system, and "separating the CCP from the administrative branch" has been advocated in Chinese academic and political circle[463]. This kind of separating, in a sense, means the distinction between the functions of party committee and that of the administrative body[464]. The "administrative head responsibility system (*xingzhengshouzhangfuzezhi*, 行政首长负责制)" was introduced after the thirteenth National Congress of CCP in 1987. According to this system, the administrative head should make decisions on, and be responsible for, routine work within the jurisdiction of the administrative branch, and the party committee should be a mere ruling body in political orientation, ideology and cadre system without intervention in the specific work undertake by the administrative body. However, the system had not been entirely established because of the political situation at home and abroad since 1989. The party committee system returned after the 1990s, and the administrative head responsibility system, which had not yet played a full role, was weakened,

[463] Li Bopeng, 'A Study of the Feasibility of Separating the Party Committee of the Chinese Communist Party from the Administrative Branch', *Legal System and society*, No. 6 (2007), 504-505.
[464] Zang Naikang, 'Paradox and Settlement in the Standardization of the Relation between Local Government and Local Party Committee', *Politics and Law*, No.4 (2006), 47-52.

due to the reinforcement of CCP's leadership after the Tiananmen Square Demonstration in 1989. From the sixteenth National Congress of CCP in 2002, "separating the party work and the administrative work" was diverted and the standardization of the relations between the party committee of the CCP and the administrative body was advocated by some scholars[465]. The main arguments include: it is impossible to separate party work from the administrative work, for the party committee had been deeply interwoven with the administrative body in China[466], thus, it is advisable to establish more reasonable relations between the party committee and the administrative organ through the enactment of laws which may separate the function of the party committee and that of the administrative body.[467] According to scholars, "standardization" intensifies the control of the CCP over socio-economic development, and increases the CCP's ability in administration[468]. However, Chinese legislative power is substantially controlled by the CCP (discussed in 3.2.1), and it is virtually impossible to enact laws to restrict the power of the CCP. At the same time, the party committee system is still vibrant in Chinese power process, and the administrative body is still overseen by the party committee of the CCP, since the secretary of local party committee still shoulders the first responsibility for local administration, most of which should be the responsibility of local governors.

It should be remembered that the cadre system of the administrative body is firmly controlled by the party committee of the CCP. On the one hand, the party committee is responsible for the nomination of the head of administrative body; on the other hand, the party committee determines the promotion of senior officials in the administrative body through the performance evaluation

[465] Zhu Guanglei & Zhou Zhenchao, 'An Examination of the Standardization of the Relations between the Party Committee and the Administrative Body', *Journal of Political Science*, No.3 (, 2004), P.53-59.

[466] Yang Guopeng, 'A Study of the Standardization of the Relations between Party Committee and the Administrative Body: the Paradigm of the Chinese Politics', *Tribune of Study*, No.1 (2005), 38-40.

[467] Hou Wanfeng, 'Standardization of the Relations between the Party Committee and the Administrative Body, and the Political Reform in China', *Theory and Reform*, No.6 (2008), 46-48.

[468] Zhu Guanglei & Zhenchao Zhou, 'Standardization of Party-Government Relation and Construction of CCP's Ability of Administration', *Forum of Chinese CCP's Cadre*, No.1 (2005), 15-18.

mechanism. The mechanism is proved to have a close correlation with land finance[469], and will be explored in detail in 3.3.1.

3.2.2.3 Control over the Judicial Branch.

Based on the 1982 Chinese Constitution, the people's court should exercise judicial powers independently; individuals, social organizations, and the administrative body should not intervene in judicial judgements. In fact, the CCP controls the people's courts through the Politics and Law Committee of the CCP (*zhengfawei*,政法委 PLC) and the bureaucratization of the judiciary.

In the Chinese context, the people's court (*renminfayuan*,人民法院), along with the people's procuratorate (*renminjianchayuan*, 人民检察院), the people's public security organ (*renmingonganjiguan*,人民公安机关), the national security organ (*guojiaanquanjiguan*,国家安全机关), the judicial administrative organs[470](*sifaxingzhengjiguan*, 司法行政机关), anti-heresy (code name 610) office (fanxiejiaobangongshi, 反邪教办公室)[471], and the people's armed police[472](*wuzhuangjingchabudui*, 武装警察部队), always go by the general name of political-legal organs(*zhengfajiguan*, 政法机关), a compound concept with obvious Chinese characteristics. A specific committee in the CCP, called the Politics and Law Committee (*zhengfawei*, 政法委; PLC), takes charge of the political-legal organs in practice. The PLC was initiated in 1980, and its predecessors were the Commission of Legal Affairs of Central Committee of CCP (*zhonggonggongyangfazhiweiyuanhui*,中共中央法制委员会) and the Leading Group of Politics and Law of Central Committee of

[469] Dong Haizhong, 'A Study of the Causal Elements for the Land Finance: A Perspective of Institutional Context', *Knowledge and Economy*, No.23 (2010), 53-54.

[470] A department of administrative branch, responsible for the management of prisons, the supervision of practising lawyers, Notary service, and legal publicity.

[471] This body is responsible for anti-heresy, such as Falundafa(法轮功).

[472] Armed force established by State Council of China; at the same time, under a professional guidance of Central Military Committee of CCP.

CCP(*zhonggonggongyangzhengfagongzuolingdaoxiaozu*, 中共中央政法工作领导小组). The original intention of the PLC was designed to reinforce the centralized leadership of the CCP[473]. According to Yin Xiaohu (殷啸虎), the dominance of the CCP over the political-legal organs is an objective and realistic demand originated from the Chinese socialist construction and the socialist rule of law[474]. Basic functions of the PLC include:(1) to guarantee that policies of CCP are fully carried out in political-legal organs; (2) to organize regular trainings for all staff working in relevant organs to improve their political accomplishments continuously; (3) to co-operate with the organizational department of the CCP in the management and inspection of cadres within political and legal organs; (4) to guide and supervise political and legal organs in some important cases through holding a coordination meeting of the people's court, the people's procuratorate, and the people's public security organ; meanwhile, to provide a primary judgement for tough cases; (5) to be responsible for the overall control of the public security and dealing with the mass emergency (*quntixingtufashijian*, 群体性突发事件).[475]

This paragraph shows that one of the functions of the PLC is to supervise the political-legal organs in some important cases, but there is no definition about "important cases". In fact, the PLC always intervenes in the judgement of cases. On the one hand, the PLC directly instructs the people's court in any judgement in which it has an interest; on the other hand, the PLC requires the chief judge of the people's court to report the details of cases, in which it takes an interest.[476] A special group, which consists of judges and procurators is always set up to accelerate the trial of cases by seeking unified opinions and actions within the political-legal organs[477]. No restriction is imposed on the practical operation of the group, and it is always

[473] Li Yang, 'A Study of the Functions of the Political and Law Committee', *Jingyue Journal*, No.1 (2015), 20-26.
[474] Yin Xiaohu, 'The Function of the Politics and Law Committee of Party Committee in Chinese Judicial System', *Legal Science*, No.6 (2012), 3-11.
[475] Zhong Jinyan, 'A Historical Study of the Political and Law Committee', *CCP History Studies*, No.4 (2014), 117-127.
[476] Wang Weiguo, 'The Political and Law Committee should Change its Functions', *Global Law Review*, No.2 (2013), 20-21.
[477] Guo Xinyang & Zhang Lili, 'On the Mechanism of Special Group by People's Court, People's Procuratoate and People's Public Security Organ', *Journal of National Prosecutors' College*, No.11 (2009), 50-52.

transformed into a device to procure compromises among relevant organs in the name of "seeking unified opinions and actions"[478]; in a sense, justice is forced to give place to judicial efficiency[479]. This incurs more and more criticisms, and is regarded as being the main cause of injustices[480]. In the meantime, working staff of the PLC is always recruited with reference to public servants, and a legal profession qualification is not the prerequisite for relevant appointments. Thus, the lack of essential legal knowledge and the indifference of legal proceedings create a horrible consequence as a result of the PLC's case intervention[481].The PLC may be identified in almost all injustices with negative social influences, such as *She Xianglin Case* (佘祥林案) and *Zhao Zuohai Case*(赵作海案), two well-known injustices in China. She Xianglin was sentenced to a term of 15 years' imprisonment because of an accusation of murder in 1998; and Zhao Zuohai was sentenced to death with a stay of execution arising from the same accusation in 2003. In the prosecution and trial, relevant people's court and people's procuratorate arrived at similar verdicts of "obscure facts and insufficient evidence", but the two innocent men were deemed to be murders by relevant PLC on a presumption of guilt. To carry out the PLC's instructions, relevant people's public security organ and people's procuratorate extorted confessions by torture; relevant people's court abused their powers in accordance with distorted facts and mendacious evidence. [482] But after serving 11 years of their sentence, the victims of the two cases returned home unexpectedly, and the two accused were acquitted.

Observations of reality show that the director of the people's public security, or the vice-governor of administrative branch, always hold the office of the head of the PLC. As for the former, the

[478] Liu Pinxin, *On the Causes and Countermeasures of Criminal Misjudged Case in China*, (Beijing: China Legal Publishing House 2009), 51.

[479] Li Yang, *A Study of the Functions of the Political and Law Committee*, 20-26.

[480] Yin Xiaohu, 'On the Function of Politics and Law Committee of Party Committee in Chinese Judicial System', *Legal Science*, No.6 (2012), 3-11.

[481] Zhou Yongkun, 'On the Reform of Politics and Law Committee of the CCP', *Legal Science*, No.5 (2012), 3-13.

[482] See (1) Detailed Process of a Murder Case, Memoir on Presumption of Guilt in Xianglin She Case, *Beijing News*, 14-04-2005, http://news.sina.com.cn/c/2005-04-14/04336379106.shtml (accessed on 07-09-2015); (2) Politics and Law Committee Confirmed the Murder and People's Procuratorate Confessed Torture, *Beijing News*, 05-11-2012, http://news.163.com/10/0511/02/66CBR7B500014AED.html (accessed on 07-09-2015).

people's court actually turns into the secondary organ of the people's public security organ which is responsible for the investigation of criminal offences; for the latter, the people's court becomes inferior to the administrative branch, which brings about the paradoxical situation in which the defendant of the administrative litigation is the leader of people's court which accepts and hears the same administrative litigation.

The bureaucratization of Chinese judiciary is also an important approach used by the CCP in the domination of judicial branch. Historically speaking, Chinese courts were always treated as part of the administrative branch, and the administrative governor always held the plural offices of the chief judge[483]. The establishment of the People's Republic of China in 1949 did not break this tradition, and people's courts were under dual leadership between 1949 and 1954: on the one hand, the court was part of the administrative branch, and had to be in the command of government at the same level; on the other hand, the inferior court must submit to the superior court[484]. As a result, the judiciary were administered on an administrative hierarchy, and the standard for promotion rested merely with political calibre. During the period between 1957 and 1977, mainland China was caught in political campaigns, and it was claimed that the people's courts should be abolished to stress the supremacy of the CCP in the country[485], as a result, the courts were taken over by the Military Control Commission (*junshiguanzhiweiyuanhui*, 军事管制委员会) at that time[486] . Since the Reform and Opening-Up initiated in 1978, judicial branches were re-established, and that "the people's court should exercise judicial power independently[487]" was written into the 1982 Chinese Constitution.

[483] Tian Zhanzhu, 'An Examination of the Power, Relationship and Law in the Chinese Context', *Democracy Monthly*, No.1 (1999), 20.

[484] Cheng Dewen, Xuxin & Jin Chengfu, *How to Re-Establish the Status of the Chinese Courts, A Study on the Modernization of the Legal System*, (Nanjing: Nanjing Normal University Press 2001), 311-325.

[485] See the article 126 of the 1982 Chinese constitution.

[486] Cheng Dewen, Xuxin & Jin Chengfu, *How to Re-Establish the Status of the Chinese Courts*, 311-325.

[487] See the Article 126 of the Chinese Constitution 1982.

In practice, the theoretical independence did not prevent the bureaucratization of the judiciary. Most of the judges were ex-soldiers between 1980s and 1990s, and political calibre still works as a vital requirement in the appointment and promotion of judges. Judges once held two titles, demonstrating their administrative function and judicial function[488], and judgements were always made on a basis of administrative hierarchy. For some major cases, judges reported the details of and the potential judgements to the judicial committee of the court, and the judicial committee made judgement on the principle of democratic centralism (*minzhujizhongzhi*, 民主集中制), that is, the chief judge, head of the judicial committee, made the final judgement, although the members of the judicial committee were allowed to present their opinions; as for minor cases, judges might make a judgement, but the chief judge and the members of the judicial committee might pressure the judges to influence the judgement. In addition, the PLC always gave instructions to the chief judge, and eventually determined relevant judgements.

From the second half of 2012, the PLC saw a decay in Chinese power mechanism, due to series of corruptions related to the political-legal organs. On 9th April 2013, membership of newly-appointed Central Committee of Politics and Law was made public, and Meng Jianzhu (孟建柱), the newly-appointed secretary of Central PLC, was excluded from the Standing Committee of Politburo, which sent a strong signal that a reform aimed at diminishing the PLC had been put into practice. Meng held that the relationship between PLC and political-legal bodies should be straightened out; at the same time, the people's court should perform functions and exercise powers independently within a legal framework.[489] What Meng has said is regarded as a wind of change for the reform of Chinese judicial system[490]. Against this backdrop, judicial independence

[488] Li Yang, 'Thoughts on the Professionalization of Judges', *Theoretic Observation*, No. 6 (2015), 22-24.
[489] Shen Xinwang, 'An Examination of the Wind Direction of the PLC's Reform', *People Digest*, No.6 (2013), 20-21.
[490] Cheng Dewen, Xuxin & Jin Chengfu, *How to Re-Establish the Status of the Chinese Courts*, 311-325.

is advocated by some scholars, and a call for the professionalization of judges is very loud[491]. Suggestions from academic circle include:

(1) Judges should not hold administrative functions,

(2) Judges should be specifically and professionally trained,

(3) Judges should exercise judicial power independently, and

(4) Judges should enjoy a job security and stable welfare.[492]

It seems that Chinese scholars note that the question of judicial independence is closely related to the bureaucratization of judges, but they fail to correlate the bureaucratization and the control of the CCP. The improvement of professional quality and job security, will definitely improve the professional skill of judges; however, professional skill is so superficial a meaning of the concept of the professionalization of the judges, that it may not reveal the essence of the "professionalization".

At the same time, the CCP's control over the judicial branch is still regarded as being the most distinct characteristic of Chinese political operations[493], and the party policies of the CCP form the body and soul of both the 1982 Chinese Constitution and of Chinese laws, because the essence of the socialist rule of law is to turn the party's policies into the state laws, as well as to turn the party's will into the state's will.[494] Some scholars even argue that the CCP's control over the judicial branch is just to "facilitate the realization of laws through effectuating party power[495]". Furthermore, the cadre of the judicial branch is still firmly controlled by the CCP via the formalized nomination of the chief judge in People's Congress. So, it is difficult, or impossible,

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[491] Lu Zhongmei, 'A Study of the Chinese Judiciary: A Perspective of Professionalization', *Chinese Legal Science*, No.6 (2003), 4-12.

[492] Kang Ning, 'Thoughts on the Professionalization of the Judges', *Changchun University of Science and Technology (Social Sciences Edition)*, No.2 (2009), 33-37.

[493] Sun Qian, 'Chinese Meaning of the Construction of Rule of Law', *Journal of National Prosecutors College*, No.1 (2013), 14-17.

[494] See the article 126 of the Chinese Constitution 1982.

[495] Mo Jihong, 'The Evolution of the Constitutional Status of the Ruling Party', *Legal Forum*, No.4 (2011), 48-53.

to make a balance between the "supervision of the party" or the "leadership of the party" and "interference of the party". In this sense, although the concept of the "independence of judicial branch" has been raised by Chinese scholars and even the senior leader of the CCP, no one dares to do research about how the judicial branch becomes independent of the CCP; on the contrary, all proposed schemes tend to emphasise that the dominance of the CCP over the judicial branch should be maintained in the future.

Therefore, the decay of the PLC does not necessarily mean the advent of a Chinese *spring* of judicial independence. In fact, judicial reform had been advocated by the CCP for 17 years since the fifteenth National Congress of the CCP in 1997; some scholars even said that the reform should draw upon judicial practice in Western countries[496]. However, Chinese judicial reform is directed by the CCP, so, it is impossible for the CCP to nullify its influence in any planned reform. According to a White Paper on Chinese judicial reform which was issued by the Chinese State Council in 2012, two rounds of judicial reform managed by the Supreme People's Court had been launched by 2012. The Judicial process has been the focus of the two rounds, and the real effect of relevant reforms is not fully up to expectations[497].

The dominance of the CCP over judicial power, is, in a sense, a manifestation of Chinese theory, the socialist rule of law, whose essence is argued to be the importance of the CCP[498], an interpretation controlled by the CCP. This point presents an opportunity for comparisons to be made between the socialist rule of law in China and the rule of law in the English context, which will be addressed in chapter 5.

[496] He Weifang, 'Adversary System and the Chinese Judiciary', *Journal of Law*, No.4 (1995), 86-93.
[497] Shen Nianzu & Yang Xiaofei, 'The Third Round of the Judicial Reform Launches', *Economic Observer*, 04-08-2014.
[498] Qi Yingyan, 'Why the Socialist Rule of Law must be led by the Chinese Communist Party', *Red Flag Manuscript*, No. 15 (2015), 18-19.

3.3 Specific Power Mechanisms in the Expansion of Local Finance.

As has been demonstrated, the CCP exerts a control over Chinese state organs through political orientation, ideology and cadre system, and this kind of control makes the People's Congress, the administrative branch and the judicial branch to be little more than the executive agency of the CCP. Against the Chinese political backdrop, it may be easily inferred that Chinese local finance is in the command of the CCP as well. This section will explore some specific mechanisms in local finance, and give some evidence in respect of the practical power mechanisms which actually lead to the failure of the rudimentary accountability mechanisms. Of course, the exploration which is related to specific power mechanisms, will provide materials for the comparative reflection between China and England in chapter 5.

3.3.1 Manipulating Local Finance through Performance Evaluation.

According to Zhou Lian (周黎安) , China has undergone a fast economic growth for more than 30 years since the Reform and Opening-Up, to which Chinese local government contribute a lot; and local government are managing to push the development of local economy with an unparalleled enthusiasm [499] . Zhou investigated the driving force which motivated local government to spare no effort to boost Chinese economy at a speed of around 10% per year, and held that it was the mechanism of cadre management, which Zhou named after the *Promotion Tournament*, that facilitated Chinese "economic wonder". He said that the mechanism had generated immense inspiration for those who care about their official careers[500]. In his research,

[499] Chen Ye, Li Hongbin & Zhou Li-an, 'Relative Performance Evaluation and the Turnover of Provincial Leaders in China', *Economics Letters*, 88 (2005), 421-425.
[500] ibid

Zhou also noted the negative effects of this mechanism, and said that the *Promotion Tournament* had produced some social issues because of severe conflicts between competing policies issued by central and local governments.[501] Zhou took notice of the potential correlation between the mechanism of cadre management and the development of Chinese local economy, and even some social problems, but he was not sure who dominated the competing policies and ascribed the *Promotion Tournament* to Chinese central government, the State Council.

The *Promotion Tournament*, is just an implied expression, which actually refers to the "Performance Evaluation Mechanism" in Chinese power practice. Performance evaluation is a very important mechanism through which the CCP exert control over cadre system in the administrative branch. Studies have shown that performance evaluation has an immediate influence on the motivation of land finance in local government[502], or it encourages the arbitrary power in the expansion of local finance. Generally speaking, the main target of performance evaluation focuses on local officials, represented by the secretary of party committee and the governor of administrative branch.[503] The purpose of the evaluation is to accomplish the policies of the CCP, officially called the social and economic development plan, which is centred on the economic indicators, the Gross Domestic Product (GDP).[504] Under performance evaluation, local officials sink into a performance predicament, which subtly pushes, or indulges the arbitrariness of the fiscal power in local government.

3.3.1.1 The Cadre System and Performance Evaluation.

In local government, the CCP controls the cadre system in the administrative branch through performance evaluation. This means that the focus of cadre system has been shifted from political

[501] Chen Ye, Li Hongbin & Zhou Li-an, *Relative Performance Evaluation*, 421-425.
[502] Qiao Kunyuan, 'A Study of Promotion Tournament Mechanism in Chinese Cadre System: Ideas and Testimony', *Economic Science*, No.1 (2013), 90-100.
[503] Chen Tan & Liu Xingyun, 'Promotion Tournament Mechanism, Promotion Game, and Ecological Condition in Chinese Officialdom', *Journal of Public Management*, No. 2(2011), 26-38.
[504] Liu Pinxin, *On the Causes and Countermeasures of Criminal Misjudged Case in China*, (Beijing: Legal Publishing House 2009), 51.

loyalty to economic performance. During the Mao-Government and in the aftermath of Maoism, the unique importance of class origin was extremely stressed in the whole of society and there is no exception in cadre management[505]. During that period, a person with an acceptable class origin, such as poor or low-middle peasants, or children of revolutionary martyrs, were thought to be, beyond doubt, competent for a leadership position, although the concept of Performance Evaluation had not been introduced at that time. Then, in Deng Xiaoping's era, economic growth was the priority of cadre management, against the social backdrop of Reform and Opening-Up, just as the well-known "Cats Theory" has revealed, "so long as the cat, white or black, can catch mice, it is a good cat" (不管黑猫白猫，抓住老鼠就是好猫). With the transformation of the guiding ideas of the CCP, in 1979, the Organization Department of the Central Committee of the CCP, issued an announcement on the launching of Performance Evaluation, and the idea of Performance Evaluation was first introduced in China. At that time, Performance Evaluation was just a concept without a materialized performance criteria.[506] Then, during a conference held by the Central Committee of the CCP in 1983, the performance criteria, covering moral traits, competence, diligence and achievement, was fixed. In most cases, moral traits, competence and diligence are associated with personal characteristics, such as age, gender, education background, work experience, and tenure on the post, which influence the probability of promotion as the reference factors[507] while achievement shows some connection between the cadre system and the economic indicators, and engaged as an essential aspect of the evaluation criteria[508] against the background of Reform and Opening-Up. In 1988, the Organization Department of the Central Committee of the CCP issued a detailed scheme of Performance Evaluation, and the value of gross output, agricultural yield, infrastructure investment, and tax revenue, became essential contents of "achievement". The CCP needs some outstanding economic indicators to

[505] Sun Xianjun, 'A study of Class, Class Origin, and Class Stand', *Journal of Jiangsu University of Science and Technology*, No. 3 (2001), 36-39.

[506] Lun Zengqing, 'A Study of Relations among Moral Traits, Competence, Intelligence, and Achievements', *Journal of the Party School of Shengli Oilfield*, No.4 (2003), 107-108.

[507] Shen Nianzu & Yang Xiaofei, 'The Third Round of Judicial Reform Launches', *Economic Observer*, 04-08-2014.

[508] Zong He, 'Keyword in the Promotion of Local Officials', *Honesty Outlook*, No.13 (2013), 26.

demonstrate the correctness of its policies, especially in respect of the Reform and Opening-Up, and the indicators are always written into the social and economic development plan by the CCP. From then on, the GDP is evaluated as a crucial indicator of local economic performance, and the promotion of local officials directly correlates the GDP[509]. Possible results of performance evaluation include four grades: preferable, good, ordinary and bad, which correspond to a potential range of career prospects, involving promotion, lateral moves, staying in the same position and termination (including demotion and retirement). Meanwhile, economic performance ranges over the growth of GDP contrasting with the immediate predecessor of relevant officials and that of neighbouring provinces[510]. In this sense, the CCP works as a referee, who blows a whistle,[511] and local officials are contestants, who must improve the GDP[512].

From the second half of 2013, the Organization Department of the Central Committee of the CCP announced the reform of the Criteria of Performance Evaluation, and ranking the GDP of local government would be prohibited, for it may equal economic development simply to the increase of the GDP and may bring about social problems[513]. However, no new clear criteria was provided by relevant department of the CCP, therefore it remains unclear on which area local government should concentrated in pushing social development. Therefore, it is too early to say that relevant change will produce positive consequence in the performance evaluation of the Chinese cadre system; but at least, it may show that the senior leaders of the CCP have realise the negative influence of the GDP-centred criteria, and would like to make some changes. Meantime, according to the minister of the Organization Department of the Central Committee, relevant changes in the evaluating standard does not mean that GDP is excluded from the performance

[509] Zhou Lian, 'A Study of the Mode of Chinese Promotion Tournament of Local Officials', *Economic Research*, No.7 (2007), 37-51.

[510] Melanie Manion, 'An Examination of the Cadre Management System, Post-Mao: The Appointment, Promotion, Transfer and Removal of Party and State Leaders', *The China Quarterly*, Vol. 102 (1985), 203-233.

[511] Chen Ye, Li Hongbin & Zhou Li-an, 'Relative Performance Evaluation and the Turnover of Provincial Leaders in China', Economics Letters 88 (2005), 421-425.

[512] Shao Mengjie & Sheng Mingke, 'Cause and Countermeasure of Performance Predicament of Local Government', *Contemporary Economy & Management*, No.9 (2013), 81-87.

[513] http://news.xinhuanet.com/politics/2013-12/10/c_118501871.htm (accessed on 07-09-2015).

criteria.[514] In fact, Chinese "Reform and Opening-Up" is said to be mainly a process of economic reform and development;[515] in this sense it is impossible for the CCP to give up GDP in imposing influence on local government through the cadre system. Thus, although new criteria are said to be set up, the GDP-oriented model of performance evaluation may not weaken its impact on the priority of the agenda of local government policies and decisions.

The factors which make local officials work extremely hard for performance evaluation may be set out as follows. On the one hand, it is human nature that each person demands promotion or the accolade of outstanding performance to provide a benchmark for his or her capability; on the other hand, it should be noted that in China, an official is, to some degree, an alternative source of power, because officials at various levels control vast sums of social wealth or the power to allocate social resources. According to the Ministry of Finance, the tax revenue for 2013 is around thirteen billion Yuan (RMB)[516], additionally, extra-budgetary revenue is also an enormous figure on which no one is able to provide an exact statistic[517]. Without essential checks and supervision, power is simply an opportunity for officials to obtain personal profit. Take Bo Xilai (薄熙来) for example. When holding the post of Governor of Liaoning Province (辽宁省) and Secretary of Liaoning provincial Party Committee from 2000 to 2004, Bo was involved in corruption and accepted bribes of more than twenty million Yuan (RMB)[518]. The potential power wielded by officials leads to a phenomena whereby once a Chinese official enters officialdom, he or she manages to hold their position and is able, at the same time, to seek potential promotion[519]. However, the term of office for local officials is always three to five years, during this short period, and in order to create a promotional opportunities, most local officials try their

[514] http://news.xinhuanet.com/politics/2013-12/10/c_118501623.htm (accessed on 07-09-2015).
[515] Zhu Jiamu, 'The Core of the 30 Years' Experiences on Chinese Reform and Opening-Up', *Studies on Marxism*, No.5, 2009, 7-12 & 161.
[516] http://gks.mof.gov.cn/zhengfuxinxi/tongjishuju/201401/t20140123_1038541.html (accessed on 07-09-2015).
[517] Hu Hua & Cheng Yao, 'Reflections on the Off-budget Revenue', *Journal of Sichuan University (Philosophy and Social Science Edition)*, S1 (2004), 186-187.
[518] A Judgement of Jinan Intermediate People's Court of Shandong Province (online), http://politics.people.com.cn/n/2013/0922/c1001-22990526.html (accessed on 07-09-2015).
[519] Tao Jianqun, 'Borrowing for Performance: Is It a Shortcut?' *People's Tribune*, No.8 (2006), 34-37.

very best to win the *Promotion Tournament*, or *the performance evaluation*, by means of creating a distinctive impact on economic performance, or by improving their local government order in the ranking of GDP. [520]

3.3.1.2 Performance Evaluation and Land Finance.

In line with Shao Mengjie (邵梦洁) and Sheng Mingke (盛明科), and in order to deal with the performance predicament stemming from the performance evaluation, local officials always apply an approach which may produce a satisfactory performance within a very short term[521]; at the same time, Sun Xiulin (孙秀林) and Zhou Feizhou (周飞舟) note that since Reform and Opening-Up, and especially since the 1990s, land finance has grown at a terrific speed, and local government underpins the rising momentum of land finance[522]. From the observation of practical operations, land finance works as the basic method to optimize economic indicators centred on the GDP, or to deal with the core concern of performance predicament in local government.

Since the 1990s, land finance is held to be a model of economic growth in mainland China,[523] and the expression is frequently used to refer to the special phenomenon whereby Chinese local government depends excessively on the selling of land for local revenue[524]. Generally speaking, the question of land ownership is the fundamental principle in the operation of land finance. In China, land in the city and on the outskirts of a city is owned by the state, and the term to describe this is 'state ownership' which arises from the 1982 Chinese Constitution. During the era of

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[520] In China, guanxi (relation) is of prime importance, to some degree, in *Promotion Tournament.* But, in official documents, the word "guanxi" cannot be found and "performance" is always referred to an elegant cause for promotion. Thus, "guanxi" just has a tacit understanding for officials with an influential "backstage manager" in Central Committee of Politburo of CCP. Not all officials can find a strong backer in Zhongnanhai(中南海), thus, this project just focuses on the routine approach of promotion, performance evaluation.

[521] Shao Mengjie & Sheng Mingke, *Cause and Countermeasure of Performance Predicament*, 81-87.

[522] Xiulin Sun& Feizhou Zhou, 'An Empirical Interpretation on Land Finance and Tax-sharing Scheme', *Chinese Social Science*, No.4 (2013), 40- 59.

[523] Zhu Qiuxia, *On the Reform of Chinese Land Finance*, (Shanghai: Lixin Accounting Publishing House 2007), 32.

[524] Lin Yang, 'Exploring Land Finance in local government from a Legal Perspective', *Journal on Economic Law*, vol.11 (2012), 294-310.

'planned economy', the right to use state-owned land was monopolized by the state, and the state permitted state institutions and state-owned enterprises the free use of land by means of land assignment (*huabo*, 划拨). In 1988, an amendment to the 1982 Chinese Constitution was enacted which allowed that the state ownership of land can be varied in conditions prescribed by relevant laws; this meant that individual citizens and private enterprise were allowed to purchase the right to use state-owned land under given conditions. Based on this amendment, a new system called the compensated use of state-owned land (*churang*, 出让) was introduced, and the money generated was the land leasing revenue which is sought after by local government. The right to use state-owned land which is purchased by individual citizens and private enterprises may also be purchased by the state, which is called land expropriation(*tudizhengyong*, 土地征用); in a way, land expropriation works as an institutional cause of land finance[525]. In the light of the 1998 amendment of the 1982 Chinese Constitution, land expropriation should be based on "public interest" and "just compensation", but the amendment itself and relevant laws do not offer a specific or workable definition for "public interest" or "just compensation". This undoubtedly provides local government with an opportunity to interpret the two concepts under the veil of "public interest"[526], whilst, at the same time, compensating individual and private holders who already hold the rights, with as little compensation as possible.

The potential revenue from land finance may be categorised in the following way. In the first place, local government obtains land leasing revenue by transacting the right of land-use to the land agent. In 1993, the amount of land leasing revenue was thirty billion Yuan (RMB); while in 2011, the amount rose massively to 2.7 trillion Yuan (RMB)[527]. In most provinces, land leasing revenue accounts for 50% of local revenue, and in others land leasing revenue even accounts for

[525] ibid

[526] Zhu Qiuxia, 'The Impact of Rural Enterprise on Household Saving in China', *ZEF-Discussion Papers on Development Policy (University of Bonn)*, No.86 (2004).

[527]Sun Xiulin & Zhou Feizhou, 'An Empirical Interpretation on Land Finance and Tax-sharing Scheme', *Chinese Social Science*, No.4 (2013), 40-59.

80%.[528] Secondly, according to the revenue-sharing scheme, the tax produced from the transactions of state owned land and commercial buildings are included in local tax. In other words, the land agent constructs residential buildings and shop premises and local government may get local taxes from the transaction of the state-owned land and the construction of buildings by the land agent.[529] Also, local government bids for investment from overseas by lowering the cost of land leasing, and by doing so, local government get a small portion of the land leasing revenue, and potential profits arising from this kind of investment is expected to harvest a wealth of tax.[530]

From practical observations of the way in which land finance actually works, it seems that:

> (1) Local government enforces their rights to use a certain piece of land at a compensatory cost to the individual or commercial user which is as low as possible, and pulls down the buildings and levels the land. In the process, forced eviction without due compensation for the holders of the right to use the land is always applied by local government so as to reduce relevant cost, and to shorten the time span. Such was the tragedy with the incident of *Tang Fuzhen*, referred to in chapter 1, which always takes place at this stage.
>
> (2) Having cleared the land, local government again sell the right to use the land to private real estate enterprises at a price as high as possible.
>
> (3) Local government get the difference between the repurchasing and selling of the right to use state-owned land, and this difference is what is called the land leasing revenue, the main part of extra-budgetary revenue.
>
> (4) Private real estate enterprise which purchases the right to use the state-owned land, constructs residential blocks on the land and sells the flats to individuals at a price as high as possible. From the construction and selling of the commercial residential buildings, local government obtain business

[528] Wang Jun, 'The Motivation of Land Finance', *Liaowang News Weekly*, No. 37, 12-09-2005.
[529] Gao Juhui& Wu Chunlai, 'Revenue-Sharing Scheme, Land Finance and New Policy on Land', *China Development Observation*, No.11 (2006), 27-29.
[530] Lin Yang, *Exploring Land Finance*, 294-310.

taxes, a kind of local tax, and the higher the housing price, the more money local government may get from local taxation.

Thus, local government are always regarded as the cause of excessive-priced housing in China[531]. Although some scholars hold that land finance is just a helpless choice due to the fiscal difficulty of local government originated from the revenue-sharing scheme[532], the costs of the right to use state-owned land has been continually increasing in order that local authorities may obtain as much land leasing revenue as possible. In the meantime, property prices have been boosted due to the increasing land leasing revenue, which facilitates local government in the collecting of more local taxes[533]. Thus, the helping hand of local government has been transformed to a grabbing hand in promoting land finance.

According to Sun Xiulin (孙秀林) and Zhou Feizhou (周飞舟), the land leasing revenue, local taxes from the land and housing transactions, are the main reasons for local government to pile up money.[534] Sun and Zhou said that land finance was an inevitable result of urbanization and industrialization in mainland China, principally because there was a sharp rise in the demand for residential houses and enterprise buildings which followed from the development of Chinese economy, and which came along with Reform and Opening-Up.[535] All of this is the logical result of "revenue centralizing and expenditure decentralizing", which originated from the revenue-sharing scheme and led to the fiscal difficulty of local government[536].

By means of land finance, local government increases tax revenue and extra-budgetary revenue, and improves local infrastructure; this, in a sense, forms a new model of local economic development. [537] However, Bian Xinlong (卞新龙) held that Chinese urbanization was a forced

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[531] Shao Mengjie & Sheng Mingke, *The Cause and Countermeasure of Performance Predicament*, 81-87.
[532] Hongyou Lu, Guangping Yuan, Sixia Chen & Shengfeng Lu, 'Land Finance, Impulse from Competition, or Helpless Choice?' *Comparative Economic & Social Systems*, No.1 (2011), 88-98.
[533] Lin Yang, *Exploring Land Finance*, 294-310.
[534] Sun Xiulin & Zhou Feizhou, *An Empirical Interpretation on Land Finance*, 40-59.
[535] ibid
[536] ibid
[537] ibid

process, rather than a natural one.[538]In fact, the motivation which underpins the process of urbanization is performance evaluation on local officials[539], and land finance is engaged just as an instrument employed by local officials to create personal performance. By attributing the Chinese urbanization and land finance to the performance evaluation mechanism, Bian presents a different train of thought in the exploration of land finance, local fiscal expansion and the arbitrariness of fiscal power in local government. According to Bian, local government at various levels have demonstrated an urgent demand for investment and money, which originated from the demand on the personal performance of local officials.[540] Bian fails to point out what controls the performance evaluation in the Chinese context, and why local officials need a satisfactory result in the evaluation.

3.3.1.3 Performance Evaluation and Power.

The CCP's control over cadre system in the administrative branch through performance evaluation is associated with the fusion of power in the Chinese context. As demonstrated in chapter 1, there is no separation of power among Chinese state organs. The People's Congress, and the administrative and judicial branches are not balanced in performing functions, that is to say, the People's Congress is of a higher status than the administrative and judicial organs.[541]The reason is that Chinese state power is said to be enjoyed, theoretically, by all the people, and "the separation of power" is said to contrary to the notion of the people's power[542], and a theory that could destroy the unity of the country[543]. In fact, the administrative branch of government assumes many more functions which results partly from Chinese political tradition that the court

[538] Bian Xinlong, 'Land Finance and Forced Urbanization', *Qiushi*, 03-03-2014.
[539] ibid
[540] ibid
[541] Xv Chongde, 'Radical Differences between the Separation of power and the System of People's Congress', *Theory Guide*, No. 2 (2009), 17.
[542] Ma Ling, 'Why the Separation of Power Cannot Replace the System of People's Congress in China', *Journal of Socialist Theory Guide*, Z1 (1990), 54-56.
[543] Nie Yueyan, 'Upholding the System of People's Congress, and Rejecting the Separation of Power', *Journal of Ideological and Theoretical Education*, No.5 (2002), 31-35.

is part of the administrative branch[544]; and partly from the expansion of administrative functions stemming from economic development and the urbanization of Chinese society since the Reform and Opening-Up[545]. Within the Chinese political context, local courts are the most vulnerable part of the practice of power. In the first place, the PLC directs the courts through judicial intervention in specific judgements, and the party committee controls the appointment of the chief judge. Secondly, the administrative branch always attempts to intervene in the courts, because the budget for the court is controlled firmly by local administrative branch.[546]Although the administrative head responsibility system has been introduced (discussed in 3.2.2), the party committee system still holds sway over the administrative branch, and the secretary of party committee always shoulders the functions of local administration, most of which should be the responsibility of local governors. Therefore, the performance evaluation on local officials, especially the administrative governor and the secretary of local party committee, play a key role in the implementation of the political polices of the CCP in local government.

In the light of the constitution of the CCP, the lower party committees should comply with the higher ones, and all party members and party committees should ultimately be subordinate to the Central Committee of CCP (mentioned in 3.2.2). Hence, performance evaluation substantially excludes ordinary people in the power process, and the people have no say in social matters concerning their own interests. [547] Anyway, performance evaluation provides arbitrary power in land finance---an encouragement or potentiality, factors which will be discussed in the following sections, combine to change the potentiality into reality in Chinese power process.

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[544] Zhao Yongxing, 'A Study of the Relations between the Administrative Branch and the Judicial Branch', *Modern Law Science*, No.5 (1997), 54-57.

[545] Zhang Xiang, 'Functional Orientation: the Logic of the Reform on the Local Government', *Social Sciences in Yunnan*, No.5 (2011), 25-29.

[546] Chen Guangzhong, 'Judicial Independence with Chinese Characteristics: From a Perspective of Legal Comparison', *Journal of Comparative Law*, No.2 (2013), 1-12.

[547] Qianfan Zhang, 'Local Autonomy is the Essence of Democracy', *SJTU Law Review*, No.1 (2010), 94-121.

3.3.2 Dominating the Examination and Approval of Budget Report.

As discussed in chapter 2, the People's Congress should supervise administrative power in the examination and approval of draft budgets, and this means the administrative body should make work statement about the revenue collection and spending at the annual session of People's Congress. However, the practice does not follow the constitutional theories. In fact, there is no time for representatives to read and understand the draft budget, which is always professionally compiled, and which must be examined within a couple of hours (demonstrated in Free from Examination or Formally Examined at the People's Congress in chapter 2). It seems that the People's Congress has not been given its due respect in the question of the examination and approval of the budget, and the "supervision" by the People's Congress, specified in Chinese theory, exists only in name[548].

It has to be understood that the CCP controls the examination and approval of budget reports at the annual session of People's Congress, and the 'formal examination' is the inevitable result of the control of the CCP over the state apparatus. The reasons may be laid out as follows:

> (1) The draft budget, which is presented by the administrative body, is always made after the intervention of the party committee. From the function table of the CCP, which is listed in 3.2.2, there is no specific organ in the party committee to take charge of fiscal affairs; written guidance on intervention could not be found. According to the Budget Law, draft budgets should be made by the administrative branch, but the administrative branch is controlled by the CCP through the party committee system. Under the party committee system, the functions of the party committees of the CCP are mixed with those of the government, and the CCP intervenes in all aspects of administrative work (discussed in 3.2.2). Based on this kind of power logic,

[548] Dong Heping, 'A Study of Relations between the Ruling Party and the State Power in China', *Legal Science*, No.2 (2008), 21-25.

it could be deduced that the budget report is drafted subject to the intervention of the CCP, and this intervention, is, in a sense, the pre-approval by the party committee. Indeed all budget reports presented at the People's Congress start with the stylized expression-----"the report is drafted under the leadership of the party committee".

(2) The budget report always represents the interest of the party committee. The main target of the party committee is to ensure that policies of the CCP are successfully carried out in local government; in terms of fiscal areas, the policies of the CCP are always demonstrated in the social and economic development plan, which is made every five years[549]. Generally speaking, the social and economic development plan is a comprehensive work plan for the administrative body, and the economic indicators are always highlighted as a priority in keeping social stability[550]. Against this backdrop, the main concern of officials is to improve economic indicators in the short term, and to give evidence of the "achievement" in performance evaluation. In the meantime, the expansion of land finance may lead to a sharp increment in local revenue in the short term,[551] which meets the party policy and the promotional desire of local governors and the secretary of the party committee. So the party committee undoubtedly manages to leave some spaces for the expansion of land finance in draft budgets.

(3) Even if there is enough time for representatives to read the draft budget, the "examination and approval" is dominated by the CCP. The CCP dominates the composition of the People's Congress, and the majority of the representatives of the People's Congress are party members. At a central level, the party members of the CCP account for around 75%[552], and in local levels the party members represent more than 90%[553]. It is worth noting that the People's Congress is structured in parallel to the governmental structure,

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[549] Sun Ping, 'The Policy of the Chinese Communist Party is the Primary Productive Force of Economic Development', *Journal of Heilongjiang Institute of Socialism*, No.3 (2002), 36-39.

[550] Xu Mengzhou, 'A Study of the Social Development Plan and the Improvement of Legal System', *The Jurist*, No.2 (2012), 47-59.

[551] Wang Meixiao, 'An Examination of Land Finance', *Times Finance*, No.23 (2014), 201&203.

[552] Li Zhu & Xiang Qian, 'A Study of the Questions about the Party Members Acting as the Representatives of the People's Congress', *People's Congress Studying*, No. 5 (2015), 10-15.

[553] Liang Tao, 'An Analysis of the Representatives of the People's Congress', *Journal of the Party School of the CCP Qingdao Municipal Committee*, No.2 (2007), 87-89.

> which includes central, provincial (including Beijing, Shanghai, Tianjin and Chongqing), county and the township levels amongst the four layers. The representatives of townships are elected by direct suffrage and the other three layers are from indirect suffrage. Regardless of whether it be direct or indirect suffrage, the candidates are recommended by the party committee of the CCP, and most of the elections are single-candidate elections.[554] Thus, draft budgets are examined by representatives approved by the party committee of the CCP, rather than those approved by Chinese people.

Therefore, there is no need for representatives, who are controlled by the party committee, to examine the draft budgets which are pre-approved by the party committee, with the intention of carrying out party policies in economic development. Even if the representatives are given enough time to examine the draft budgets, a majority of them will definitely vote for the report, since all party members must obey an important principle-----"lower levels of party committee should obey higher levels of party committee, and all party members and party committees should obey the Central Committee (*xiajifucongshangji quandangfuconghongyang*, 下级服从上级 全党服从中央)[555]".

3.3.3 Controlling People's Court.

The 1982 Chinese Constitution includes a clause relating to the status of the people's court: the people's court should exercise judicial power independently.[556] According to the 2014 amendment of the Administrative Litigation Law, an administrative act may be challenged in the people's court. In fact, the people's court depends on the administrative body for money, and on the party committee of the CCP for the appointment of personnel. As a result, not all administrative acts in respect of land finance are challengeable through the legal mechanism. On the one hand, although administrative acts, including the abstract and specific administrative acts,

[554] Xie Baofu, 'A Study of the Election of the Representatives of the People's Congress', *Qiushi*, S1 (2004), 21-22.
[555] See the article 16 of the constitution of the CCP.
[556] See the article 126 of the Chinese Constitution 1982.

may be sued in the light of the 2014 amendment. It is still impossible for an ordinary citizen to challenge an abstract administrative act like local government budget, and the reason include:

(1) Because of the formal disclosure of local financial information (discussed in 2.2.7 and will be further discussed in 3.3.5), a citizen has no channel to have a clear idea about the contents of budget;

(2) Even if he or she knows about the weakness of relevant budget in the provision of public services, it is difficult for him or her to take judicial proceedings against local government, because it may be difficult for him of her to certify that he or she has a direct and specific stake with the budget.[557] Generally speaking, the public budget has a general effect on relevant residents, but there are always a lot of contents in a budget, and general effect could not be seen as a specific and direct stake.[558]

(3) The decision-making and the implementation of governmental decisions in the field of land finance always relates to the policies of the CCP, and under communist control, especially personnel and financial control (this point has been discussed in 3.3.2). It is impossible for the court to accept a lawsuit aiming at its fiscal and personnel master. Even if relevant suits is accepted and heard in the people's court, most of the time, they are always turned down by the people's court thanks to the personnel and fiscal control of the CCP over the judicial branch. In addition, according to the Administrative Litigation Law, administrative litigation does not interrupt the implementation of involved administrative acts, and the justice period – the waiting period -- for administrative litigation is more than six month in the light of the Law[559]. Therefore, administrative litigation may be meaningless for financial decisions, because the money may

[557] See the article 25 of the Administrative Litigation Law.

[558] Liu Yantao, 'A Study on the Stake of Administrative Litigation', *Journal of Political Science and Law*, No. 2, 2015, 40-50.

[559] At least three months for the hearing in the court of first instance and three months in the court of second instance.

have been spent during the litigation period. Thus, the judicial mechanism which is supposed to make local government accountable for their fiscal decisions, does not work in practice.

The practical status of the people's court in mainland China is the inevitable result of the control of the CCP over the mechanics of power. In theory, Chinese state power is operated on the basis of power fusion, that is, the administrative body and the judicial body are generated by, and responsible for the people's congress. In practice, the people's congress is tightly controlled by the CCP, and the power to appoint the chief judge of the people's court is also dominated by the CCP. The chief judge is the head of the judicial bureaucracy, and he (she) determines the appointment and promotion of other judges.[560] By controlling the appointment of the chief judge, the CCP controls the cadre system of people's courts. Besides, the PLC works as a specific organ to ensure the delivery of the policies of the CCP in the judicial branch. On the one hand, the PLC is responsible for the political training for judges on a regular basis; on the other hand, the PLC always intervenes in the judgements, and gives instructions to the chief judge. The intervention of the CCP gives rise to lots of injustice in mainland China, and "*She Xianglin Case*" and "*Zhao Zuohai Case*", are two well-known injustices (discussed in 3.2.2).

In the expansion of land finance, the judicial mechanism hardly performs any role in making local government accountable for their decision-making, and the controlling mechanisms of the CCP are at the core of the failure of the people's court: (1) land finance meets the policies of the CCP, which is always written into the five-year plan about Chinese social development. Under the command of the PLC, Chinese judges regularly study the policies of the CCP, and they have a clear understanding of the significance of land finance in pushing local finance and economic indicators. Thus, Chinese judges are duty bound to support local economic development against this political background.[561] If cases related to land finance are heard and local government loses

[560] Zuo Weimin, 'A Study of the Practical functions of Chief Judge', *China Law Science*, No.1 (2014), 7-27.
[561] Li Jie, 'Political-Legal Organs Should Escort Economic Development', *Hengyang Daily*, 08-27-2014.

the lawsuit, it may mean that the judicial branch has overstepped its authority, and has reviewed administrative power, a duty which should be undertaken by People's Congress in the light of the 1982 Chinese Constitution, and of the CCP in practice. It may also imply that the judge opposes the policies of the CCP, and does not uphold the supremacy of the CCP, and this would constitute a very serious issues concerning political correctness. In these circumstances, it would be very dangerous for the judge, and he or she would be first unseated, then separated for a political review by the PLC. If judges assist local government in winning a lawsuit, there is obvious injustice for the citizens who are involved, and this may make the judges conscience-stricken. This is a dilemma for judges, and they always choose to reject the complaint on land finance. (2) Cases concerning land finance are always associated with the policies of the CCP, so they are classified as important cases, which needs the co-ordination of the PLC. Under the co-ordination of the PLC, laws will be set aside, and the policies of the party will replace them. This means even if the cases are accepted and heard by the people's court, the PLC will intervene in the judgements by direct instruction to the chief judge. Based on these two points, judicial independence which appears to be written in the Chinese Constitution is, in fact, totally controlled by the CCP, and the judicial mechanism in local finance fails to work.

3.3.4 Formulising the Auditing System.

Chinese theory outlines an auditing system ambiguously. The auditing bureau in local government should exercise auditing power independently, and should be responsible for local government and the auditing bureau in the superior level; the auditor-general is appointed by People's Congress at the same level. In practice, the auditing bureau works as one of the departments of local government, for it depends local government for money. Thus, the auditing action plays a very limited role in holding local government to account for fiscal decisions in land finance.

In the practice of power, the auditing bureau is part of the administrative branch, and the auditor-general and the auditing bureau must submit to the party committee system: on the one hand, the appointment of the auditor-general is controlled by the CCP through the nominal procedure of People's Congress; on the other hand, the party committee may intervene and command the audit-general and the auditing bureau in their routine work.

Thus, the auditing system is actually a working department of the party committee of the CCP, and the priority of the auditing process is to make sure the policies of the CCP are implemented. As discussed in the above section, the expansion of land finance may lead to the improvement of economic indicators, and it is a convenient approach employed by the governors and the secretary of the party committee to meet the performance evaluation and get a satisfactory result. Therefore, it is axiomatic that the auditing-general's role is to ensure the accomplishment of economic performance. In this sense, the Chinese auditing, as an accountability mechanism, seemingly designed to make local government answerable for fiscal decisions in theory, is only a veneer superimposed on Chinese power mechanisms in practice. Therefore, the audit-general always highlights small problems in local finance, which demonstrates the importance of his role, but in reality he plays no part in making local government accountable.

3.3.5 Making the Disclosure of Fiscal Information an Instrument.

According to Chinese theory, local government should disclose fiscal information after the approval of the people's congress. In fact, the disclosure of relevant information is so concise that it is difficult for citizens to equate the figures with the spending of local revenue. With the development of an anti-corruption campaign, the disclosure of fiscal information is taken seriously in mainland China, and the requirement to disclose fiscal information was written into the amendment of the Budget Law in 2014. It seems that the disclosure of fiscal information has become a tool of the CCP to fight corruption.

In the Chinese context, the reason why local government discloses fiscal information in a very concise manner, is ascribed to: (1) the absence of the Freedom of Information in the Chinese constitution; (2) lack of detailed instructions in the amendment of the Budget Law. [562] The basic logic of Chinese scholars is likely to be: there is no detailed requirement about what to disclose in theory, so the disclosure may be concise. But if the theory were to be perfected, could there be benefits arising from the practice of disclosure of fiscal information in local government? The answer in not too optimistic because of the following reasons: the party committee of the CCP and the administrative body in local government are always mixed up, and it is very difficult, or impossible to separate the party work from the administrative work[563]. There arises a very important issues insofar as the party committee needs money to maintain their daily work. However, there is no law in the Chinese context that affords a legal (or formal) status to the CCP, although some Chinese scholars argue that the legitimacy of the ruling of the CCP over mainland China lies in the historical process of the establishment of the PRC.[564] Anyway, the money spend on the operation of the party committee of the CCP does not have a legal foundation; the party committee and the administrative branch are mixed up in the daily work, therefore it can be argued that the expenditure on their daily work cannot be separated easily. In this sense, the concise disclosure of fiscal information seems to conceal something, important for the functioning of the CCP. In fact, the amount of the "three public consumptions" (*sangongxiaofei*, 三公消费) by the government, including vehicle purchasing and maintenance, overseas travel and receptions for the public sector, has a striking high level[565]. A rough statistic shows that the fiscal expenditure covering public receptions and overseas travel amounts respectively to a

[562] Zeng Junping, 'A study of the Drawbacks on the System of Fiscal Disclosure', *China Reform*, No. 5 (2010), 31-33.
[563] Xu Baoyou, 'A study of the Feature of Relations between the Chinese Communist Party and Administrative Branch in Transitional period', *Contemporary World & Socialism*, No.2 (2009), 129-133.
[564] Yang Zhanying & Wu Chengyi, 'A Historical Review and Prospect of the Legitimacy of the Leading of the Chinese Communist Party', in *the Annual Symposium of the Social institute of Jiangsu,* 2011, 19-35.
[565] Yin Yanwen, 'Problem and Approaches to Three Public Consumption', *Journal of North University of China*, No. 5 (2014), 62-66.

hundred billion Yuan (RMB) every year in local government[566] and the amount of money triples in vehicle purchasing and maintenance[567]. Scholars call on local government to disclose figures on the three public consumptions[568], and very few institutions of local government (including Beijing, Shanghai, and Shanxi) respond to this[569]. Therefore, this process does not include criticism on the expenditure of the CCP.

This means that the non-disclosure of fiscal information in local government is a very convenient way to hide something which the CCP does not want people know, but it also leads to problems for the CCP itself. The official way for the public to access fiscal information is blocked by non-disclosure, and this can lead to governors and the secretary of the party committee of the CCP becoming corrupt. The anti-corruption campaign, or "*hunting tigers, and flapping flies* (*cangyinglaohuyiqida*, 苍蝇老虎一起打)", demonstrates that corruption is associated with the non-transparency of the fiscal information.[570] At the present time, corruption is so severe that it determines the survival or downfall of the CCP in the future[571]. Against this backdrop, the CCP pushed the amendment of the Budget Law in 2014[572], and the disclosure of fiscal information becomes a legal duty of local government. In this sense, the disclosure is only a tool of the CCP to maintain its domination as long as possible, rather than an accountability mechanism to make local government accountable for fiscal decisions.

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[566] Hu Hai, 'The Way to the Governance under the Rule of Law: Regulating Three Public Consumption', *Journal of Hunan Administration Institute*, No. 6 (2013), 93-97.

[567] Yin Yanwen, *Problem and Approaches*, 62-66.

[568] Li Zhanle, 'A Study of Three Public Consumption: *Status Quo*, Issues and Solution', *Social Sciences in Yunnan*, No. 2 (2012), 106-110.

[569] Pan Hongqi, 'The Disclosure of Three Public Consumption in Local Government is Imperative', *Orient Morning Post*, 16-09-2011.

[570] Liu Jianwen & Geng Ying, 'A Study of the Disclosure of Public Finance from a Perspective of Anti-Corruption', *Jiang-huai Tribune*, No.1 (2014), 117-123.

[571] Ma Lili & Hu Dongdong, 'A Study of the Influence of Corruption', *Legal system and Society*, No. 27 (2011), 306.

[572] Decision on the Deepening of Reforms on Budgetary System, issued by the State Council of China, http://www.gov.cn/zhengce/content/2014-10/08/content_9125.htm (accessed on 09-09-2015).

3.4 Conclusion.

What has been demonstrated so far verifies that there is a gap between the theoretical principles and the practical mechanisms in respect of fiscal power in Chinese local government finance; the latent power mechanisms controlled by the CCP, which cannot be found in any law-books, set aside the rudimentary accountability mechanisms, written into the 1982 Constitution.

According to Guo Daohui (郭道晖), the CCP should work as a political authority, and avoid any confusion with state power.[573] Even if the political authority of the CCP is supported by Chinese people, no general binding force could be produced by this authority,[574] that is, the leadership of the CCP should not overrule the 1982 Chinese Constitution and laws.[575] In line with Guo's logical-inference, the unique position of the CCP should still be in accord with the institutional spirit of the system of People's Congress. However, the political practice is the converse of Guo's argument. The theory of bottom-up democratic mechanism has been replaced by the top-down mechanism controlled by the CCP. If Chinese political system could be compared to a drama, the CCP acts as a scriptwriter, the administrative branch works as actors, the People's Congress is just a spectator who is in charged with applauding a brilliant story and an exquisite performance, but the judicial branch is not allowed to make a sound.

The top-down mechanism is just a self-disciplined mechanism, relying on the self-control and moral influence, rather than the Constitution and laws; alternatively, the Constitution and laws are just instruments to realize the policies of the CCP. In the Chinese context, moral standard are based on the Confucianism,[576] which advocates absolute obedience. According to Confucianism,

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[573] Guo Daohui, 'A study of the Status and Function of Political Party in the Construction of a Country under the Rule of Law', *Peking University Law Journal*, No.5 (1998), 1-7.

[574] Yang Jiejun, 'Evaluation and Analysis on Phenomena in the Development of the Rule of Law', *Legal Science*, No.11 (2006), 92-100.

[575] Guo Daohui, 'Authority, Right of the Party, or State Power: Relations between the Party and the People's Congress', *Chinese Journal of Law*, No.1 (1994), 4-12.

[576] The establishment of the PRC in 1949 seemed to saw a decay of Confucianism and a prosperity of Marxism and Maoism. Mao argued to damage Four Olds(四旧), or the "old culture, old idea, old custom, and old habit", in which

a child should subordinate itself to his (or her) father, a wife should subordinate herself to her husband, an official at lower levels should be subordinate to a leader at higher level, and a subject should be subordinate to an emperor; the "father", "husband", "leader" and "emperor" are assumed to be a moralist with a consciousness of self-control[577]. In this sense, Chinese officials, both central and local, both higher and lower, are assumed to be virtuous persons who exercise powers properly with inner morality and without the need for an exterior accountability mechanism. Chinese power practice, at least in the expansion of local finance, just gives the evidence that under the top-down accountability mechanism, no official is a moralist who consciously exercises self-control and self-discipline. What is more, in seeking economic development and personal performance, fixed by the CCP, the People's Congress, the people's court, the auditors, and local officials, totally disregard the Chinese Constitution; this unconstitutionality, which is manipulated by the CCP, has been defended in the name of "benign unconstitutionality".

Hao Tiechuan (郝铁川) presented the concept of "benign unconstitutionality" in 1996, which referred to the phenomenon that the People's Congress, the administrative branch, and the governmental leaders, seemingly violate the Chinese Constitution, but actually accord with the fundamental interests of Chinese people, and the policies of the CCP[578]. Hao argued that "benign unconstitutionality" should not be opposed. Other scholars, represented by Tong Zhiwei (童之伟), refuted Hao's viewpoint and held that "benign unconstitutionality" had exceeded the

Confucianism was included. However, Marxism and Maoism contributed little to Chinese moral standard, for Maoism paid more attention to the theory of wars, and Marxism was introduced to China as the originator of class viewpoint, which stressed class difference and class struggle. Neither of the theories provided a new moral criterion for Chinese people, and the deification of them gave rise to a culture catastrophe and a moral distortion during the Cultural Revolution (1966-1976). Many cultural objects and historic relics, including the Ruins of Yuanmingyuan (圆明园遗址), was destroyed deliberately; polite behaviours and good manners were attacked and defeated by discourteousness. After the Reform and Opening-Up, the CCP announced again and again to set up a socialist moral, but they give socialist moral a political definition, just as discussed in chapter 2; meantime, Confucianism seems to restore its position in Chinese moral outlook with a trend of re-establishing traditional culture, with its essence being kept and dross being discarded, and this trend is initiated by the CCP itself. Against this background, Confucianism is now still guiding the Chinese moral standard, and an idea of Confucian constitutionalism was even raised by a public lawyer, Qiufeng (秋风) in 2011.

[577] Yang Zibin, 'A study of the Relations between the Monarch and his Subjects', *Qilu Journal*, No.5 (1986), 94-95.

[578] Hao Tiechuan, 'A Study of the Benign Unconstitutionality', *Chinese Journal of Law*, No.6 (1996), 91-93.

baseline of the *pro forma* constitutionality, and involved policies and activities that were divorced from the orbit of constitutionalism. In this sense, "benign unconstitutionality" means the death of the Chinese Constitution, and the breakup of Chinese legal system based on the Constitution. This would lead directly to the rule of a political party.[579] It seemed that Hao attempted to mitigate the tensions between the policies of the CCP and the Chinese Constitution by resorting to the concept of "benign unconstitutionality", but the concept revealed the fact that Chinese power practice have departed from the 1982 Constitution completely. In this sense, the expression of "benign unconstitutionality" is just a tolerance of the abuse of power.

At present time, the domination of the CCP could not be shaken, and the failure of the accountability mechanisms in local finance, or, the unconstrained fiscal power in local government will continue to be the reality. On the one hand, there is no "power vacuum" which is free from the absolute control of the CCP; the legislative branch, the administrative branch, and the judicial branch, whether in central or local government, are all firmly controlled by the CCP. It is too difficult to find an opportunity to challenge the deep-rooted force of the CCP, only the ruling party can oppose or resist itself. On the other hand, no political force could challenge the dominant position of the CCP in Chinese political life. The number of members of the Chinese Communist Party was 82.6 million by 2011[580], accounting for 6.35 per cent of the 1.3 billion Chinese total population[581]. China is still an agricultural society with eighty million rural population[582], and the 82.6 million party members are actually controlling Chinese political circles, business circles, academic circles, military circles, etc. There are eight democratic parties in mainland China, and the members of the eight democratic parties are only eight hundred

[579] Tong Zhiwei, 'The Baseline of Implementation of the Constitution: to Deliberate with Hao Tiechuan on Benign Unconstitutionality', *Science of Law*, No.5 (1997), 21-24.

[580] The Must-know Information about the 18th Central Committee of the Chinese Communist Party, published by the Press Centre of CCTV through its official website http://news.cntv.cn/special/Diagram/01/index.shtml.

[581] The Announcement of the 6th National Population Census, released by the National Bureau of Statistics of the Peoples' Republic of China (online), http://www.stats.gov.cn:82/tjsj/tjgb/rkpcgb/qgrkpcgb/201104/t20110428_30327.html (accessed on 07-09-2015).

[582] ibid

thousand[583], far away from contending the CCP. What is more, only one member of the eight hundred thousand, Wan Gang(万钢), serves as full ministerial level in the Chinese State Council, the head of the Ministry of Science and Technology(*zhonghuarenmingongheguokejibu*, 中华人民共和国科技部). In fact, the eight democratic parties are "builders of the socialist cause[584]" led by the CCP, and their existence merely demonstrates the democratic quality of the regime controlled by the CCP[585], rather than a political force which could counterbalance the absolute control of the CCP. As a result, the eight democratic parties have never present any political stand which might contradict that of the CCP during the past sixty-six years (from the establishment of the PRC in 1949 till present time). In addition, all party members of the CCP enjoy the vested interests stemming from the supremacy of the CCP, and no doubt they manage to support the dominant position of the CCP, and marginalise the eight democratic parties and other political force which are a potential to threat the supremacy of the ruling party.

Overall, the rudimentary power mechanisms, written in the 1982 Chinese Constitution and discussed in chapter 2, are actually controlled through the command of the CCP over Chinese power process, and this control is a comprehensive, covering the whole area of state powers. The expansion of land finance is an inevitable result of the control of the CCP over power mechanisms in local government finance, which manipulates local finance through performance evaluation, dominates the examination and approval of local drafted budget, controls the people's courts, formulises the auditing system, and makes the disclosure of fiscal information an instrument. That is to say, the control of the CCP over the power process leads to the discrepancy of Chinese theories and power practice, and the failure of accountability mechanisms in the exercise of fiscal

583 Sun Ruihua, 'The Study of the Nature of Chinese Democratic Parties', *Journal of Chongqing Institute of Socialism*, No. 2 (2014), 30-34.

584 See the Preface of the 1982 Chinese Constitution.

585 Tang Changjiu & Zuo Jianying, 'A Study of the Values of Chinese Democratic Parties in Political Life', *Journal of Hubei Institute of Socialism*, No. 5 (2014), 12-14.

power in land finance. At least at the present time, it is uneasy to shake this kind of political control in Chinese political circumstances.

Chapter 4: Accountability Mechanisms in Local Finance in England: Tradition and Actuality

4.1 Introduction

The purpose of this chapter is the exploration of accountability mechanisms and underlying rationales associated with the exercise of fiscal power in local government in England. Secondly, the aim is to formulate the groundwork in preparation for a reflective comparison between mainland China and England, focusing on the power mechanisms in respect of local finance. It is not, and is not intended to be, a comprehensive or detailed account, but it seeks to highlight some key issues that can inform comparative reflection.

Chinese issues and their theoretical and practical contexts have been presented in chapters 2 and 3. Local finance in China is operated within the parameters of failing accountability mechanisms, which originate from the absolute control of the Chinese Communist Party over the power process. On the one hand, there is a set of rudimentary accountability mechanisms written in the 1982 Chinese Constitution, but relevant provisions are too vague to be enforced in practice. For instance, the Chinese Constitution sets some ambiguous principles relating to the status of local government----"giving full scope to the creativity, initiative and enthusiasm of local authorities under the unified leadership of the central government[586]". This vague wording----"creativity, initiative and enthusiasm", leads to the overlap of governmental functions between, and the possibility of the shifting of responsibilities from central to local government. Consequentially, local finance is adversely affected by the decentralization of fiscal expenditure and the centralization of revenue in accordance with the revenue-sharing scheme, which brings about fiscal difficulties in local authorities. On the other hand, local government in mainland China is

[586] See the article 3 of the 1982 Chinese Constitution.

actually dominated by the CCP through its absolute control over the political orientation, ideology and cadre system of state apparatus. In the process, the performance evaluation mechanism, targeting the indexes of GDP, sharpens the financial predicament of local government and pushes the expansion of land finance. Due to the failure of accountability mechanisms, Chinese local government seems to expand their fiscal base unrestrictedly, which has resulted in social problems, including excessive-priced housing, and the infringement of human rights.

From the perspective of constitutional law, the *status quo* of fiscal power in mainland China gives occasion to further consider some propositions which are fundamentally significant, such as the balance of local self-government and central control in a unitary regime, the protection of human rights and the realization of government policies, etc. These propositions relate closely to the implementation of some basic principles of institutional morality, especially the rule of law and accountability. However, based on the analyses of previous chapters, the principles of institutional morality are somewhat unclear in the Chinese context, and relevant issues are always simplified as matters revolving around "centralization—decentralization".

In order to draw on solutions from elsewhere, this chapter focuses on the approach through which institutional morality circumscribes fiscal power in local authorities in England. England was once referred to as "a country of local government[587]", and local authorities have a long history which dates back to the twelfth century[588], much earlier than the emergence of central government. This thesis is not pure historical research, and the historical review of local finance presents only a contextual background and will be selective in accordance with the target of this chapter. Thus, traditions, instituted along with the reforms between 1830s and 1890s, especially in the last quarter of the twentieth century, will occupy much more time. In the process, the

[587] Edward Jenks, *An Outline of English Local Government* (seventh edition), (London: Methuen & CO. LTD 1930), 2.
[588] David King, *Local Government Organisation and Finance: United Kingdom*, in Anwar Shah (edited), *Local Governance in Industrial Countries*, (Washington D.C.: The World Bank 2006*),* 267.

accountability mechanisms, and the rationales underlying the mechanisms, will be emphasized as focal points, given the intended function of the chapter.

4.2 The Vicissitudes of Local Finance in England.

This chapter will focus on the fiscal situation and power mechanisms in England, rather than those in the UK, and the reasons for this, including the practicability of potential comparisons due to the commonality of problems between the two countries, and personal preference in exploring the operation of fiscal power in the home country of modern constitutionalism and rule of law, have already been presented in chapter 1.

England was at one time claimed to be "pre-eminently a country of local government[589]". Although two great historians, Beatrice and Sydney Webb, insisted that the use of the term "local government" had not been arrived at until the middle of nineteenth century[590], the principles of local government, namely the political units of local authorities, were factually defined long before the central government came into existence.[591] As mentioned previously, the historical account of local finance starts with a specific time span between the 1830s and 1890s,[592] because before those reforms, local bodies were small-scale establishments based on the royal charters giving them a single function, rather than on the consent of local residents, and they provided a small amount of services funded by rates[593].

[589] Edward Jenks, *An Outline of English Local Government,* 2.
[590] C.D. Foster, R.A. Jackman & M. Perlman, *Local Government Finance in a Unitary State*, (London: George Allen & Unwin 1980), 9.
[591] Edward Jenks, *An Outline of English Local Government,* 2.
[592] Ian Loveland, *Constitutional Law: A Critical Introduction* (second edition), (London: Lexisnexis Butterworth 2000), 190.
[593] Tony Travers and Anna Capaldi, Local Government, Lyons and Place-Shaping 2003 to 2007 and beyond, (CIPFA 2007), 1.

4.2.1 The Modernization of Local Government.

During the period between the 1830s and 1890s, England saw the development of modern local government, which was featured locally elected councils, and the process is regarded as being the "modernization" of local government.[594] This process was realized with the aid of reforms, confirmed by Parliamentary statutes, including the Municipal corporations Act of 1835 and the Local Government Act of 1888. The phrase "modernization" was employed mainly to indicate the democratic quality of relevant reforms in local councils. To be specific, the Municipal Corporations Act of 1835 introduced an elective principle to urban areas of England and recognized that "councilors should hold office on a basis of periodic elections[595]". The reforms were extended, first to counties and county boroughs in accordance with the Local Government Act of 1888, and then to the urban district councils, rural district councils and parish councils along with the enactment of the Local Government Act of 1894. As a result, elected councils began to substitute local regimes organized on royal charters; council policies, together with the methods of raising enough money for the implementation of relevant policies, became the subject of periodic reviews by local electorate. With the enactment of these acts, the "multi-functional" nature of local government gradually emerged in England, which assumed various functions, including housing provision, town planning, public health, etc.

In the process of modernization, local finance saw some essential changes. In the first place, section 92 of the Municipal Corporations Act of 1835 determined that the costs of managing municipal government should be funded by a yield from municipal property. Local authorities were allowed to possess their own properties; but "the rents and profits of all corporate land, and the interest, dividends, and the annual proceeds of all money, dues, chattels, and valuable

[594] Ian Loveland, *Constitutional Law*, 190.

[595] Harold J. Laski, W. Ivor Jennings & William A. Robson (edited), *A Century of Municipal Progress 1835-1935*, (London: George Allen & Unwin LTD 1936*)*, 305.

securities belonging or payable to a municipal corporation[596]" constituted a large proportion of a council's annual income which was legitimate by the Act. Secondly, local income was required to be placed in a consolidated account, which seemed to create some potential for the central control over local expenditure.[597] Besides, fiscal expenditure of a council, which was clarified in section 140 of the Municipal Consolidation Act of 1882, involved "the remuneration of municipal officers, and the general expenses necessary for carrying the Municipal Corporation Act into effect[598]". Throughout the nineteenth century, police and poor relief, the most ancient services undertaken by local authorities, accounted for the bulk of local expenditure. In addition, the increase in property liable for taxation, together with a rapid increase in the urban population, came hand in hand, due largely to the influence of the industrial revolution.[599] However, this gave rise to a slow growth of income from the rates, and a sharp rise in local expenditure in terms of its size and range.[600] Against this background, local expenditure was deficient when it came to satisfying the ever-increasing demand for local services. To deal with this problem, grants from central government were created to fund the new category of services.

The original grants from the central government, introduced in 1825, were for prison service,[601] which were said to be a measure of "securing the co-operation of local authorities in the maintenance of national standards[602]". At the early stage, the proportion of local expenditure covered by grants was extremely small, for instance, the percentage in 1842-1843 was 2.7 and it rose to 5.4 percent in 1852-1853[603]. At that time, to ensure the money was spent in accordance

[596] See the section 92 of the Municipal Corporations Act 1835, and the section 139, 140 of the Municipal Consolidation Act 1882.
[597] Josef Redlich & Francis W. Hirst, *Local Government in England* (Vol.2), (London: Macmillan and Co. Limited 1903), 237-241.
[598] ibid, 272.
[599] Maureen Schulz, *The Development of the Grant system*, from C.H. Wilson (edited), *Essays on Local Government*, (Oxford: Basil Blackwell 1948*)*, 113.
[600] C. D. Foster, R. A. Jackman, & M. Perlman, *Local Government Finance in a Unitary State*, 152-183.
[601] R. J. Bennett, *Central Grants to Local Governments: the Political and Economic Impact of the Rate Support Grant in England and Wales*, (Cambridge: Cambridge University Press 1982), 40.
[602] Maureen Schulz, *The Development of the Grant system*, 113.
[603] Josef Redlich & Francis W. Hirst, *Local Government in England*, 240.

with an intended target, a local auditor was introduced to scrutinize how local authorities spent the money. The Local Government Act of 1888 instituted the first general block grant in the form of "assigned revenues"; and by this means, a proportion of central taxes was re-allocated to local authorities in the light of revenue-sharing.[604] Overall, the grant system was an important instrument employed by central government to supplement local revenue, and to equalize the standards of services provided by different local authorities. Over the course of time this funding became an influential mechanism to develop central control over local revenue and expenditure. Central control over local finance by means of grant system is a gradual process and will be illustrated in the following sections, especially policies initiated by the Conservative government between 1979 and 1992.

Although reforms during the period between 1830 and the 1890s, introduced elective mechanism for local councils, two distinct qualification for franchise existed; the franchise for Parliament and franchise for local councils, and these co-existed in England for a long time. The struggle arising from the rights of citizenship and the rights of property, witnessed the national recognition of local democracy;[605] this was largely because those who were in favor of the rights of citizenship and believed that political participation in the process of local government should be an inherent right of human beings, and those who promoted participation through property rights, nevertheless shared a belief that responsible government could be carried out only by stakeholders of the country.[606] The Representation of the People Acts 1918 and 1928 brought about universal suffrage in a Parliamentary scenario, while franchise for councils remained property-based for a longer time. Thus, during the period which is known as the modernization of local government, local finance was scrutinized on a limited base through the electoral

[604] R. J. Bennett, *Central Grants to Local Governments*, 40.
[605] Tony Travers, *The Politics of Local Government Finance*, (London: Allen & Unwin Publishers Ltd 1986), 56.
[606] E. L. Hasluck, M. A. F.R.Hist.S., *Local Government in England* (second edition), (London: Cambridge University Press 1948), 22.

mechanism.

Overall, the modernization of local government produced elected and multi-functional local government across the whole of England, and all local authorities were transformed into statutory corporations established in the light of Parliamentary acts. In the process, the principle of *Ultra Vires* was established arising from the common law influence of *Colman* v. *Eastern Counties Railway Company*[607] in 1846, and *East Anglian Railway Company* v. *Eastern Counties Railway Company*[608] in 1851.[609] Local government, owing to their status as corporations, were restricted by the doctrine of *ultra vires*; this mean that policies, regulations or actions of local government would be *ultra vires* if relevant authorization had not been given by Parliament.

4.2.2 Local Authorities before 1980.

Local authorities were regarded by some lawyers, including W. Ivor Jennings, as representing a century of *progress* between 1835 and 1935,[610] but the fifty years following the "*progress*", was labelled as a municipal *decline*, as discussed in, for example, the work of Martin Loughlin.[611] In terms of the time span, this section will focus on the first thirty years of the 20th century, and the fifty years from 1935 to 1985 to explore allegations of decline. Of course, the current section will examine the progress and decline from a perspective of local finance, given the focus of this thesis, which is about fiscal power in local government.

Sir Josiah Stamp, in "The Finance of Municipal Government", a chapter of *A Century of Municipal Progress*, made a contrast between "the fragmented and rather primitive state of local government finance in the 1830s and the much larger and more organized machinery of the

[607] 50 E.R. 481.
[608] 138 E.R. 680.
[609] W. Ivor Jennings, Central Control, in Harold J. Laski, W .Ivor Jennings, William A. Robson (edited), *A Century of Municipal Progress*, (London: George Allen & Unwin LTD 1936), 418.
[610] As the title *A Century of Municipal Progress 1835-1935* indicates.
[611] As the title *Half a Century of Municipal Decline* 1935-1985 indicates.

1930s[612]". His views are based on contrasting the changes of the system and may be defined as progress or decline. In the first place, great progress had been made in local finance within roughly one hundred years from the 1830s, and the criteria for judging the progress, was focused on the internal operations, efficiency and orderliness with which the local finance was conducted.[613] Most of the progress, including the administrative cost of municipal government should be funded by the taxation of municipal property, the introduction of the consolidated account, and the definition of local expenditure, have been covered in 4.2.1. An important development during the first thirty years of the 20th century was the change to rating system. In 1925, the Rating and Valuation Act was enacted; the Act simplified the making and collecting of rates, and promoted uniformity in the valuation of property for rating purpose.[614] To be specific, the general rate was introduced to replace the poor rate and any other rate levied by councils[615]; the standard of assessment, fixed in the 1840[616], continued to have effect during the period, and the occupiers of land, house, etc. were still the person liable for paying the rate. In the meantime, a major block grant, the general exchequer contribution, was introduced along with the enactment of the Local Government Act of 1929. The 1929 Act, acknowledged, for the first time, the role of local authorities in England as a competent element of the overall government system, and laid a foundation for the partnership between central and local governments in the delivery of minimum standard of public services.[617]

During the period between the middle of 1930s and the reforms introduced by the Conservative government in 1980s, the period of fifty years following the publication of *A Century of Municipal Progress*, local government finance had a comprehensive impact on residents and on economic efficiency, which was regarded as being "a continuing and increasingly serious source

[612] Richard Jackman, *Local Government Finance*, in Martin Loughlin, M. David Gelfand, and Ken Young (edited), *Half a Century of Municipal Decline 1935-1985*, (London: George Allen & Unwin 1985), 122.
[613] ibid
[614] J.M. Drummond, *The Finance of Local Government*, (London: George Allen & Unwin Ltd 1962), 27.
[615] See the article 2 of the Rating and Valuation Act 1925.
[616] S J.M. Drummond, *The Finance of Local Government*, 27.
[617] R. J. Bennett, *Central Grants to Local Governments*, 44.

of discontent[618]". The fifty years are said to be "half a century of municipal decline" just as the title of *Half a Century of Municipal Decline 1935-1985* suggests, and the main reason was considered to be the failure of central government.[619] England saw a variety of changes in governmental functions and activities during that period. The changes introduced by the postwar Labour Government have been "crudely characterized as a shift away from the provision of trading services towards an array of services of the postwar welfare state[620]". By 1935, local services, including the provision and maintenance of drains, sewers, the issue of infectious disease, gas, public cleaning, water supply, electricity, tramways, omnibuses, highways, parks and fire brigades, covered approximately fifty per cent of the gross current expenditure of a typical local authority.[621] By 1950 most of the services were taken away from local government and operated by central government or public corporations at a national level. For instance, the municipal gas and electricity undertakings were re-arranged to be operated by national corporations during 1948-1949.[622] Local government lost one of the substantial sources of income derived from relevant service charges. At the same time, the remaining services to be provided by local government, education and housing, became the most important elements in local spending and accounting for its rapid increase.[623]Local government spending tripled from 1950 to 1975[624], and the proportion of local expenditure in the GDP, by 1975, ran up to a ratio of 18 per cent[625], despite the fact that water and sewerage and local health services were taken away from local authorities.

Specific grants continued to steadily increase, but this was regarded as undermining the independence of local authorities.[626] In order to resolve this problem, many specific grants were

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[618] Richard Jackman, *Local Government Finance*, 122.
[619] ibid, 123-124.
[620] ibid
[621] ibid
[622] R. J. Bennett, *Central Grants to Local Governments*, 44.
[623] ibid
[624] C.D. Foster, R .A. Jackman & M. Perlman, *Local Government in a Unitary State*, 102-128.
[625] ibid
[626] Richard Jackman, *Local Government Finance*, 123.

consolidated into a new block grant, a general grant, following the Local Government Act of 1958.[627]In addition, the equalization grants, including first the exchequer equalization grant, then the rate deficiency grant and the general grant, were employed frequently with an intention of supplying poorer authorities with more revenue, and this led to the augmentation of grants.[628] Therefore, grant-aid from central government had been increasing and this led to a tendency to reinforced control over local finance by central government. With the enactment of the Local Government Act 1966, the Rate Support Grant (RSG) was instituted. RSG, a hybrid of the previous general grant and rate deficiency grant[629], was designed to give local government a relatively stable financial base as an alternative measure for the non-performance of relevant reform in local rates[630]. With the implementation of RSG, most central grants were integrated into a single mode of payment. This category of general grant, protected local authorities against detailed central control by ensuring that grants were allocated in line with a common formula rather than being dependent on central approval of specific local services[631].

Local authorities saw a judicial self-limitation during this period of time, and an important case, *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation*[632] demonstrated that the courts were very reluctant to questioning policies of local councils [633] through the device of "*Wednesbury unreasonableness*". In *Wednesbury*, the court reiterated that judicial authorities were entitled to interfere in the behavior of local authorities by investigating whether or not it had taken into account what it ought not to have taken into account, or had failed to take into account what it ought to have taken into account.[634] The defendant in *Wednesdbury*, the licensing

[627] See the part 1 of the Local Government Act 1958.
[628] C.D. Foster, R .A. Jackman & M. Perlman, *Local Government in a Unitary State*, 102-128.
[629] R. J. Bennett, *Central Grants to Local Governments*, 46.
[630] ibid
[631] Martin Loughlin, *Legality and Locality: the Role of Law in Central-Local Government*, (Oxford: *Clarendon Press* 1996), 89.
[632] [1948] 1 KB 223.
[633] Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (sixth edition), (Oxford: Oxford University Press 2012), 312.
[634] [1948] 1 KB 223.

authority, had taken into account what it ought to take into account, namely the well-being and physical and moral health of children likely to visit the cinema, thus, the decision could not be concluded as unreasonable. Broadly speaking, *Wednesdbury* is associated with the exercise of discretionary power in local government, and the point will be discussed in 4.4.2.

4.2.3 Conservative Government between 1979 and 1992.

A Conservative Government came into power in 1979, and a series of reforms, involving the structure and finance of local government was launched. On the one hand, the role of local government was re-shaped, and local services were changed into something like trading services following market disciplines.[635]On the other hand, the multifunctional local authorities were re-organized, and local government functions were re-assigned to newly established single-purpose agencies.[636] Local authority finance in England went through what has been described as a "succession of ill-thought-out policies which neither achieved the Government's objectives nor maintained a sound and healthy system of local government[637]".

First, central government introduced a block grant system, through which expenditure targets for each local authority was set, and the central control over local expenditure was intensified.[638] The block grant mechanism was put into effect with the enactment of the Local Government Planning and Land Act 1980, and it was considered as introducing a new era of "creeping centralization of power.[639]" During the twentieth century, local authorities had been funded mainly by grants from central government,[640] and local authorities enjoyed no freedom to re-allocate the money, because specific grants were always earmarked for a specific purpose. Block grant were said to

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635 Mark R. Freeland, 'Government by contract and Public Law', *Public Law*, spring (1994), 86-104.

636 Martin Loughlin, *The Restructuring of Central-Local Government Relations*, in Jeffrey Jowell & Dawn Oliver (edited), *The Changing Constitution* (third edition), (Oxford: Clarendon Press 1994), 261-294.

637 Martine Loughlin, *Legality and Locality*, 89.

638 R. J. Bennett, *Central Grants to Local Governments*, 46.

639 Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights*, 312.

640 Alan Crispin & Francis Marlsden-Wilson, *Local Responses to Block Grant: the Case of Education*, in Michael Goldsmith (edited), *New Research in Central-Local Relations*, (Farnham: Gower Publishing Company 1986), 215.

improve the RSG by incorporating incentives to reduce local government expenditure[641]. In fact, the block grant did not lead to the reduction of local expenditure, and many authorities retained a high-level of spending.[642] The Local Government Act of 1982 introduced spending targets for local government. In line with the Act, [643] an overall spending target was estimated for each authority, if a council's spending exceeded the pre-estimated target, a specific amount of the grant would be withheld by the Department of Environment which decided the spending targets for each local authority.[644].

However, more severe penalties did not necessarily stop local authorities from higher spending. Some local authorities, which levied ever-higher rates upon ratepayers and received ever-lower grants from central government, were still supported by electorates;[645] some authorities defied the grant penalties by raising rates to such high levels that they obtained no grants from central government at all.[646] Thus, the "grant penalties" did not work effectively either in bringing down local expenditure or in disillusioning local voters from supporting parties with a higher spending agenda.[647]. At the same time, the grant penalties undermined political accountability in local finance,[648] and this may mean it excluded local voters from political process in respect of fiscal sphere,[649] and the conventional status of local authorities as independent political organ was severely impaired.[650]An extreme case is the rate-capping argument between Liverpool council led by the then left-wing Labour party and Margaret Thatcher's Conservative government. Liverpool challenged the ceiling of local expenditure,[651] with the intention of stopping central government from intervening in local spending, and in order to stop the government from

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641 E. L. Hasluck, M. A. F.R.Hist.S., *Local Government in England (second edition)*, 22.
642 Peter Jenkins, *Mrs. Thatcher's Revolution: the End of a Socialist Era*, (London: Jonathan Cape 1989), 13.
643 Department of the Environment, *Paying for Local Government*, Cmnd 9714 (1986).
644 The Government Expenditure Plans 1988-89 to 1990-91, Vol. 1, Cmnd 288 (1975).
645 Martin Loughlin, *The Restructuring of Central-Local Government Relations*, 261-294.
646 Martin Loughlin, *The Restructuring of Central-Local Government Relations*, 261-294.
647 E. L. Hasluck, M. A. F.R.Hist.S., *Local Government in England (second edition)*, 22.
648 Richard Jackman, 'The Rate Bills---- a Measure of Desperation', *Political Quarterly*, No. 55 (1985), 161-170.
649 Martin Loughlin, *The Restructuring of Central-Local Government Relations*, 261-294.
650 Richard Jackman, *The Rate Bills*, 161-170.
651 Peter Taaffe & Tony Mulhearn, *Liverpool: a City that Dared to Fight*, (London: Fortress 1988), 101-103.

interfering in the budget-setting for the financial year 1985-1986.[652]In the face of a potential budget crisis, and the possibility of individual surcharging and disqualification of councilors from elected office, Liverpool councilors became divisive from within; and ministers offered the council leaders about £20 million extra money for housing.[653] The campaign ended with the acceptance of the offer which was regarded by the council leaders to be a kind of concession of central government[654], and other commentators argued that the Liverpool Council succeeded by issuing an open invitation to councils to say the caps did not fit and they would not wear them[655].

Neither block grant nor rate-capping worked well, this was viewed by Martin Loughlin as "expose certain structural weakness in the entire system of local government finance[656]". Besides, "grant penalties" and "rate-capping" brought central-local relation to a stage of juridification[657] in England, and it was regarded as being "an entirely understandable and predictable way[658]" for local authorities. For instance, grant penalties were challenged by councils who resorted to judicial review, and a case in point is *R v Secretary of State for the Environment, ex p Hackney London Borough Council*[659]. In this case, Hackney LBC council said that the spending plan decided by central government for the council should be practical, and be accompanied by relevant adjustments or cuts in services, otherwise, the expenditure target was suspected of being *ultra vires*.[660] The court regarded the matter as being a political controversy between central and local governments and refused to become involved.[661] Another case, *Nottinghamshire County Council v Secretary of State for the Environment*[662], reaffirmed the position that the courts were

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[652] David Walker, 'Liverpool Postpones its Budget', *The Times*, 30 March 1984, 1.
[653] Derek Hatton, *Inside Left*, (London: Bloomsbury 1988), 84-85.
[654] ibid
[655] David Walker, *Liverpool Postpones its Budget*, 1.
[656] Martin Loughlin, *The Restructuring of Central-Local Government Relations*, 261-294.
[657] Juridification is the word used by Martin Loughlin in *The Restructuring of Central-Local Government Relations*, in Jowell Jeffrey & Dawn Oliver (edited), *The Changing Constitution* (third edition), (Oxford: Clarendon Press 1994); and Martin Loughlin, *Legality and Locality: the Role Law in Central-Local Relation*, (Oxford: Clarendon Press 1996).
[658] Audit Commission, *The Impact on Local Authorities' Economy, Efficiency and Effectiveness of the Block Grant Distribution System*, (London: Stationery Office 1984), 27.
[659] [1983] 1 W LR 524.
[660] ibid
[661] [1983] 1 W LR 524.
[662] [1986] AC 240.

reluctant to be involved in political disputes. In 1986, two case, *R v Secretary of State for the Environment, ex p Birmingham city council* [663] and *R v Secretary of State for the Environment, ex p Greenwich London Borough Council,* [664] challenged "rate-capping" by initiating judicial review proceedings, and responses from the courts were positive in both of them. From the cases, the role of the judicial branch in intervening in the decision-making process in local authorities was demonstrated, and this point will be further discussed in 4.3 and 4.4.

There were also financial conflicts between local agencies. An important case is *Bromley LBC* v *Greater London Council* [665]. The Greater London Council, under Labour leadership, were committed through their manifesto promises, to cutting a quarter of transport fares, around £120 million per year. The sum may have included a £69 million operating deficit and a £50 million loss of grant aid from central government[666], and a supplementary rate was planned to be levied on all London boroughs to cover the money. Labour won the election, and *Bromley* council which was controlled by the Conservative and liable to pay for the financial deficit and loss, launched a judicial procedure to challenge the Fares Fair.

From a legal point of view, the transport role of GLC originated from the Transport (London) Act 1969, and according to the Act, there was a duty to provide an "efficient, economic and integrated[667]" which fell on the GLC; at the same time, the London Transport Executive was created to manage transport related services[668]. The judges said that the supplementary rate was illegal and quashed it on the ground: (1) the GLC could give general directions on matters of policy but could not interfere with the day-to-day running of its affairs on a proper construction of the 1969 Act, thus, the GLC had no power to make resolutions to enforce a 25 per cent cut in

[663] [1987] RVR 53.
[664] [1987] RVR 48.
[665] [1983] 1 AC 768.
[666] Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights*, 321.
[667] See the section 1 of the Transport (London) Act 1969.
[668] ibid

fares, and the commitment was a political motives that was *ultra vires*[669]; (2) the GLC owed a duty to the travelling public to provide an efficient and economic service at reasonable fares, and to charge ratepayers as no more than was reasonable; in carrying out those duties, it had to balance the conflicting interests of the travelling public who wished for cheap fares against the interests of the ratepayers in not being overcharged.[670] The GLC had regarded an election result as giving it a mandate to fulfil the promise it had made to cut fares on London transport, and had determined to go ahead with that cut irrespective of the resultant hardship on ratepayers[671]. It had erred in giving such weight to the manifesto. Moreover, no explanation had been given for the figure of 25 per cent, which seemed to be an arbitrary figure, amounting to a gift to travelling public at the expense of the ratepayers[672]. It was eventually determined that the GLC's action went beyond its statutory powers and were distorted by the GLC's having given undue weight to the manifesto and by the arbitrary and unfair nature of the decision.[673]

With the failure of "grant penalties" and rate-capping, central government proposed the most radical measure to reform local finance, and the reform was "designed to ensure local democracy and local accountability were substantially strengthened"[674]. According to Martin Loughlin, the reform was fostered by a concern that those who paid for local services accounted for just one-third of those who voted for local services[675]. The reform was launched with the enactment of the Local Government Finance Act 1988, which "aimed to simplify the grant system, to reform the arrangements for the taxation of the non-domestic sector and to establish a closer nexus between voting and paying by making the marginal cost of local services payable by all voters equally.[676]" Such measures had a far-reaching influence on local finance: the nationalization of the non-

[669] [1983] 1 AC 768.
[670] ibid
[671] [1983] 1 AC 768.
[672] Martin Loughlin, *Local Government in the Modern State*, 69-75.
[673] ibid
[674] Department of the Environment, *Paying for Local Government*, Cmnd. 9714.
[675] Martin Loughlin, *Local Government in the Modern State*, 69-75.
[676] Martin Loughlin, *Legality and Locality*, 94.

domestic rate pushed the scale of central grants up to around 85 per cent[677], and the community charge (a poll tax) "raised even more serious issues[678]".

Community charge was a flat rate tax made on all adult inhabitants, and was collected by local authorities. [679] In simple terms, a simple tax on domestic property was replaced by a tax on everyone living in that property. The property tax that had existed for around seven centuries in England was fundamentally changed by the introduction of the community charge. In the process, the ability theory of taxation created by and evolved around the property tax seemed to be discarded. What is more, local authorities became, an administrative agency of central government, which was responsible for certain services, rather than a tier of government conferred upon the power to taxation.[680] During the 1990s, the community charge saw extensive non-cooperation by the public, and by the end of 1991, £7.5 million liability orders had been issued, while the proportion of non-collected community charge amounted to at least £1.5 billion.[681]Community charge was repealed in 1993, and replaced by council tax, one of the main sources of locally collected revenue existing at the current time in England[682].

4.2.4 Local Finance in the 21st Century

The Labour party won the general election in 1997, and launched the reform of local government, during the period, local government had many of its powers removed and their role reduced.[683] Central government gave local government a new role in the Local Government Act 2000.

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[677] ibid

[678] David Butler, Andrew Adonis & Tony Travers, *Failure in British Government: the Politics of the Poll Tax*, (Oxford: Oxford University Press 1994), 265.

[679] See the article 2 of the Local Government Finance Act 1988.

[680] Martine Loughlin, *Legality and Locality*, 94.

[681] Philip A. Thomas, 'From Mckenzie Friend to Leicester Assistant: the Impact of the Poll Tax', *Public Law*, No. 2(1992), 208-220.

[682] Michael Varney, *United Kingdom---Local Government in England: Localism Delivered?* in Caro Panara and Michael Varney edited, *Local Government in Europe: the "Fourth Level" in the EU Multi-layered System of Governance*, (London: Routledge 2015), 361.

[683] Janice Morphet, *Modern Local Government*, (London: SAGE Publications 2008), 11.

Councils should work in partnership with other public, private, and voluntary organizations and with local people to promote the economic, social, and environmental well-being of their jurisdictions.[684] Local government should act less as providers of services and more of a facilitator or enabler of services,[685] a policy which was to be achieved through a range of techniques, including democratic participation and best values.[686] The democratic participation in the decision-making of local government saw some new measures, including a referendum in the event of increasing council tax, which will be discussed in the political accountability mechanism through local electorate in 3.1; best value was a concept introduced to England as a governmental policy affecting the provision of public service. According to the Local Government Act 1999, "a best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness".[687] George Boyne said that best value is a complex and evolving concept, and at least three distinct but linked definitions can be identified, ranging from organisational performance, organisational processes and the relationship between processes and performance. [688] The core of the definitions may rest with a requirement for the performance of local government, that is, an appropriate approach to the provision of public services, involving a balance between local expenditure and the quality of the money spent,[689] having regard for a combination of economy, efficiency and effectiveness[690].

The introduction of these changes seemingly empowered local authorities to do whatever they consider appropriate to "achieve the promotion or improvement of the economic, social and

[684] Dawn Oliver, *Constitutional Reform in the UK*, (Oxford: Oxford University Press 2003), 299.
[685] Ian Leigh, Law, politics and Local Democracy, (Oxford: Oxford University press 2000), 59-63.
[686] Janice Morphet, *Modern Local Government*, 11.
[687] See section 3 of the Local Government Act 1999.
[688] George A. Boyne, 'Introduction: Processes, Performance and Best Value in Local Government', *Local Government Studies*, 25:2 (1999), 1-15.
[689] Janice Morphet, *Modern Local Government*, 11.
[690] See the section 3 of the Local Government Act 1999.

environmental well-being of the local area[691]". However, the formal breadth of local government powers saw vital restriction upon councils' capacity - the Court of Appeal in *Brent LBC v Risk Management Partners Ltd.*[692] Meanwhile it was thought that central government intended to introduce a statutory duty for local government to contribute to the accomplishment of sustainable development[693] and the new powers were a vehicle to carry out the Sustainable Community Strategies.[694] In this sense, "sustainable development" had been at the core of the new powers, and relevant decision-making in local government providing an overall framework in which councils could perform, and superseding all existing functions performed by local authorities[695]; on the other hand, it "ensured that centralized authority retained a guiding role in the method through which the well-being power was used.[696]"

A general power of competence was introduced in the Localism Act 2011. According to section 1(1) of the Act, councils may do "anything an individual may do" for the purpose of commerce or for the benefit of councils themselves, their resident population, or the transient population. The general power of competence may be exercised "in innovative ways, that is, in doing things that are unlike anything that a local authority---or any other public body---has done before, or may currently do[697]".

How is it possible to interpret a power which is provided by relevant statute as being "anything an individual may do"? Is it an unfettered discretion conferred upon local authorities? The judgment of *R. v Secretary of state for Health*[698] managed to fence the operation of general power

[691] Ashley Bowes & John Stanton, 'The Localism Act 2011 and the General Power of Competence', *Public Law*, July (2014), 392-402.
[692] *Brent LBC v Risk Management Partners Ltd.* [2010] PTSR 349.
[693] V. Jenkins, 'Learning from the Past: Achieving Sustainable Development in the Reform of Local Government', *Public Law*, No.1 (2002), 130-141.
[694] ibid
[695] Department for Transport and the Regions, *Modern Local Government: in Touch with the People*, Cm.4014, (1998).
[696] Ashley Bowes & John Stanton, *The Localism Act 2011*, 392-402.
[697] See the para. 10 of the Explanatory Notes to the Localism Act 2011.
[698] *R. (on the application of Lewisham LBC) v Secretary of state for Health*, [2013] PTSR. 1298.

by setting forth a duty for relevant officials "to act fairly in all circumstances[699]". In *Shrewsbury & Atcham BC v the Secretary of State for Communities and Local Government*[700], the judge furthered the consideration of the rationality of public power, and held that as a matter of capacity, a public body has power to do whatever a private person can do; but as an organ of government, it can only exercise those powers for public benefit, and for identifiably "governmental" purposes within limits set by laws.[701]

In terms of local finance, only 35 per cent of local revenue is now levied and collected by councils in England[702]. Local tax in England is mainly collected through council tax, which covers merely a minority of local expenditure.[703] Along with the introduction of council tax, universal rate-capping was applied, abolished and re-introduced;[704] rate-capping continues to allow the central government to intervene in local finance by imposing a ceiling on the tax rate of councils, and this might strip the councils of limited freedom in respect of local finance.[705] Although a large proportion of the central government grant that was previously subject to ring-fencing has now seen constraints removed,[706] and the trend is to be maintained,[707] it is still controversial to say the central control over local finance is alleviated. In the first place, the Localism Act 2011 seems to remove the "direct powers from the Secretary of State to impose caps on potential increases in the Council tax.[708]" The Act has introduced a new chapter 4ZA of the Local Government Finance Act (LGFA) 1992, and a referendum is required in the event of excessive increase in the council tax according to the 4ZA; if targeted increase is vetoed by the electorate, it should be changed to

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699 ibid

700 [2008] EWCA Civ 148; [2008] 3 All ER 548.

701 ibid

702 Department for Communities and Local Government (2012) *Local government Financial Statistics England*, (London: The Stationery Office 2012), 31.

703 Michael Varney, *United Kingdom---Local Government in England*, 362.

704 Tony Travers & Lorena Esposito, *The Decline and Fall of Local Democracy: A History of Local Government Finance*, (London: Policy Exchange/ New Economics foundation 2003), 24-25.

705 Ian Leign, *Law, Politics, and Local Democracy*, 105-115.

706 Michael Varney, *United Kingdom---Local Government in England*, 362.

707 Public Expenditure: Statistical Analyses 2012, Cm 8376. Quoted from Michael Varney, *United Kingdom---Local Government in England*, 363.

708 Michael Varney, *United Kingdom---Local Government in England*, 363.

a level which is seen as being not excessive.[709] However, under the section 52ZC of the LGFA 1992, the question of whether or not an authority's relevant basic amount of council tax is excessive must be subject to a set of principles [710] determined by the Secretary of state[711], and approved by the House of Commons.[712] Therefore, a significant degree of power is still vested in central government. In the meantime, the potential cost of undertaking such a referendum may prevent authorities from increasing at or above the percentage set by central government for the triggering of the referendum, although the introduction of referendum seems to bring about an interesting mechanism of the expression of local democracy and autonomy.[713] In practice, such referendum is not frequently used by local authorities, and only one referendum, so far, has taken place under relevant provisions. The poll was held on 7 May 2015 in Bedfordshire for a proposed increase of 15.8% in council tax for 2015-2016, and the proposal was vetoed with 69.5% of the voters' opposition and 30.5% of the voters' support.[714]

Besides, it may be argued that government's measures have driven a consolidation of local government and a stripping of some powers, i.e. the accelerated "academisation" of schools. The academisation means schools in England will be funded directly by central government rather than under local education authority control.[715] According to the Academies Act 2010, the academy status is extended in England; the Prime Minister of the UK, David Cameron, pledged in a conference speech in the fall of 2015 to turn schools in England into academies independent of local government control, and legislation bill to implement the pledge will be published as soon as possible. [716] A possible outcome of the reform may be schools will have increased

[709] See Chapter 4ZA of the Local Government Finance Act 1992.
[710] The principles for the financial year 2016-2017 may be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/498421/HC790_Referendums_relating_to_council_tax_increases.pdf (accessed on 11-11-2015).
[711] See section 52ZC of the Local Government Finance Act 1992.
[712] See section 52ZD of the Local Government Finance Act 1992.
[713] Michael Varney, *United Kingdom---Local Government in England*, 363.
[714] Mark Sandford, 'Council Tax: Local Referendums', *Briefing Paper* by the House of Commons, No. 05682.
[715] Jeffrey Jowell, Dawn Oliver & Colm O'Cinneide (edited), *The Changing Constitution*, 301.
[716] The Guardian online news at http://www.theguardian.com/education/2016/mar/15/every-english-school-to-become-an-academy-ministers-to-announce (accessed on 11-11-2015).

freedom in the use of their budget, curriculum, etc. However, it also criticized as an attack to local educational authorities, and bears a sign of central control. [717]

In addition, the business rate retention may need selective analysis. Before April 2013, all business rate income collected by councils were returned to central government, which then re-distributed the money to councils in the form of formula grant, based on the Local Government Finance Act 1988. The Local Government Finance Act 2012 empowered local authorities to keep half of the business rate income in their area by dividing business rate revenue into the local share and central share,[718] by enacting a new Sch. 7B to the Local Government Finance Act 1988. The central share is redistributed to local government in the form of revenue support grant and other grants; the local share is kept by local government. This new system is intended to give local authorities a strong incentive to promote local economic growth, and increased financial autonomy and a greater stake in the economic future of their area.[719] It was put into effect in April 2013. After two years' operation, a survey directed by Local Government Association reveals that, besides the existing amount of business rate appeals and the unpredictable losses of local money, a key risk of the system lies in the non-balanced distribution business rate base, because some authorities are dependent on a smaller number of businesses for their business rate income .[720] The Local Government Association continues to call for an increase in the local share of business rates, but relevant advice should ensure that the system continues to offer protection to authorities with lower business rates tax-bases and higher needs. At the same time, this point seems like a possible analogy of the fiscal imbalance between the two countries, due to the failure of transfer payment system in China. However, as discussed in chapter 1, the commonality of issues between the two countries lies in the weak status of local government, and this point will

[717] Jeffrey Jowell, Dawn Oliver & Colm O'Cinneide (edited), *The Changing Constitution*, 301.
[718] See Explanatory Notes of the Local Government Finance Act 2012.
[719] Business Rate Retention: the Story Continues, a paper by Local Government Association, online sources at http://www.local.gov.uk/documents/10180/11309/L15-127+Business+rates+retention_v03+(7).pdf/25da4d89-5a12-482a-a83c-69eac0555d9b (accessed on 11-11-2015).
[720] ibid

not be paid extra attention in chapter 5.

Meanwhile, the Cities and Local Government Devolution Act 2016 will enable local areas (combined authorities) to introduce elected regional mayors [721] and pave the way for the most radical decentralization of power in generations.[722] The Act got the royal assent in 28th January. It is argued that the directly elected mayors may bring about functional separation between the executive and the elected assembly of councilors, and possible alleviate political party dominance on local government.[723] But the political apathy of local electorates and the low turnout in local elections (discussed in 4.3.1) may be a problem in relevant elections.

In practice, Central control over local finance has not become loosened, for instance, George Osborne, the Chancellor of Exchequer, has announced the need to toughly manage public money, and future government must meet a "new balanced" budget target in 2015,[724] a policy on the control of public spending approved by the House of Commons.[725] The outcome of George Osborne's measure is interesting and introduces tight control from the central government on local finance. In addition, some strategic projects of central government may influence local finance. For example, the proposal of a Northern Powerhouse initiated by the coalition government, is a plan to push economic growth in northern England, including the cities of Liverpool, Manchester, Leeds, Sheffield, Newcastle and Hull. This strategic plan is expected to be realized through investments in transport links[726], science and innovations, and the devolution of powers in cities deals.[727] The successful implementation of this plan may become a stimulus

[721] See the article 2 of the cities and Local Government Devolution Act 2016.
[722] Online resources at https://www.gov.uk/government/news/radical-shake-up-of-power-puts-communities-in-control
[723] Jeffrey Jowell, Dawn Oliver, & Colm O'Cinneide (edited), *The Changing Constitution*, 295.
[724] George Osborne Launches Tough New "Balanced Budget" Target---- that Tories have not met since 1991, online Mirror News at http://www.mirror.co.uk/news/uk-news/george-osborne-launches-tough-new-5856034 (accessed on 15-11-2015).
[725] See online BBC News at http://www.bbc.co.uk/news/uk-politics-34524078 (accessed on 23-11-2015). .
[726] The Northern Powerhouse: One Agenda, One Economy, One North (online), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/427339/the-northern-powerhouse-tagged.pdf (accessed on 11-11-2015).
[727] Chancellor, We need a Northern Powerhouse (speech script online), https://www.gov.uk/government/speeches/chancellor-we-need-a-northern-powerhouse(accessed on 11-11-2015)

of revenue growth in relevant regions, but money is really needed from governmental bodies, including central and local governments, and private investors, to support its operation. This means that the use of grant aid from central government and local expenditure in relevant regions may be influenced by the project. Of course, the project is still in progress, and its results, especially with regards to local finance are still awaited.

4.3 The Accountability Mechanisms in Local Finance

From a legal perspective, England has a multiple system of accountability mechanisms, which work through a combination of political accountability, legal accountability, administrative accountability, social accountability, and private law accountability. Each of these mechanisms is explored in this section.

4.3.1 Political Accountability Mechanism through Local Electorate.

Theoretically speaking, the principle that local councils are responsible to their own electorate in respect of financial decisions should be an important factor in local democracy, which may be indicative of the dispersal of power in the UK. Ian Loveland says that the notion of "government" went with the idea that elected representatives are authorized to raise sufficient revenue to bring governmental policies into practices, and relevant powers exercised by local authorities would be limited only by democratic process justified periodically.[728]In this sense, the local electorate should work as "a counterweight to the authority of Whitehall[729]". The standpoint expressed by Ian Loveland is part of the European Charter of Local Self-Government 1985, which was ratified

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[728] Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (Sixth Edition), (Oxford: Oxford University Press 2009), 309.

[729] Colin Turpin and Adam Tomkins, *British Government and the Constitution* (Six Edition), (Cambridge: Cambridge University Press 2007), 259.

by the Westminster Parliament in 1998. Article 9 of the Treaty requires signatory states to give local authorities adequate financial resources of their own[730]. In addition, the principle of "subsidiarity" is defined by the Treaty as a democratic principle that "decisions should be taken at the nearest feasible level to those who are affected by them"[731]. However, the UK's ratification of the Treaty is considered by some to be of greater symbolic than legal significance,[732] and it would be erroneous to suggest that local finance is a miniature of representative democracy, because electoral indifference has been a serious and longstanding issue,[733]and democratic control does not generally work well in local government.

The main principle of the electorate mechanism is local elections, and they have been experiencing a continuing decline in the number of people voting. Turnout in local councils have not been greater than 40 per cent for decades, and during 1990s voting in some authorities dropped to around 10 per cent.[734]Against this backdrop, political accountability through local elections has been seriously challenged and the legitimacy of local democracy was even severely questioned. The issue of centrally controlled grants has undermined the political dependence of local authorities as well. According to Ian Loveland, a layer of elected bodies whose revenue and expenditure is dominated by another government organization of a higher level "would not in any meaningful sense be a layer of government at all, but would be merely an administering agency doing the bidding of its fiscal master[735]". As far as the *status quo* of local finance is concerned, if local government are practically powerless in respect of revenue collection and fiscal expenditure, why bother to vote in local elections[736]?!

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730 See the article 9 of the European Charter of Local Self-Government 1985.

731 Jeffrey Jowell & Dawn Oliver (edited), *The Changing Constitution* (seventh edition), (Oxford: Oxford University Press 2011), 240.

732 Ian Leign, *Law, Politics, and Local Democracy*, 105-115.

733 ibid

734 Colin Turpin and Adam Tomkins, *British Government and the Constitution*, 259.

735 Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: a Critical Introduction* (fifth Edition), (Oxford: Oxford University Press 2009), 319-321.

736 Jeffrey Jowell & Dawn Oliver (edited), *The Changing Constitution*, 240.

Although low turnouts in local election, for instance, 36 per cent in 2014[737], have been criticized[738] as being in response to the ideal of financial self-government, there are legislative developments designed to improve the apathy of the local electorate and of the political participation in local government finance. A local government elector is entitled to inspect local accounts and financial documents, and to make copies of accounts and relevant documents, according to the Audit Commission Act 1998.[739] Although the Nolan Committee argued that objections to local accounts had been abused by those who are unhappy with the financial behavior of local councils[740], the fact that 34 councils received more than 80 objection on the local accounts during the fiscal year 1994 to 1995,[741] might demonstrate the extent to which the public had been involved and local accounts had been questioned. Besides, the Local Audit and Accountability Act 2014 authorized a local government elector to film, tweet and blog and access information relating to the decisions made in the meetings of local government bodies[742].

In addition, the proposals on "direct" or "deliberative" democratic experiments were tabled to tackle the lower turnouts of local elections, and the measures include local referendums, citizens' juries, service user panels, questionnaires, and focus groups[743]. The Localism Act 2011 stipulated that excessive council tax is subject to the approval of the electorate in a referendum, and such a provision is a powerful guarantee of public participation in the scrutiny of financial decision-making in the field of "excessive local tax". But levies within the framework of "local tax" are excluded from a referendum according to the Act. As mentioned in 4.2, the Local Audit and

[737] The European Parliamentary Elections the Local Government Election in England and Northern Ireland: a Report on the Administration of the 22 May 2014 Elections, from the official website http://www.electoralcommission.org.uk/data/assets/pdf_file/0010/169867/EP-and-local-elections-report-May-2014.pdf (accessed on 14-11-2015).

[738] Ian Leign, *The Changing Nature of the Local State*, in Jeffrey Jowell, Dawn Oliver, and Colm O'Cinneide (edited), *The Changing Constitution* (eighth edition), (Oxford: Oxford University Press 2015), 282.

[739] See the section 14 of Audit commission Act 1998.

[740] Third Report from the Committee on Standards in Public Life, Standards of Conduct in Local Government in England, Scotland and Wales, Cm. 3702 (1997).

[741] See commissioned report by B. Walker, S. Delay & A. Marsh, Challenges to Local Authority Accounts, DETR, 1997.

[742] See the section 40 of the Local Audit and Accountability Act 2014.

[743] Jeffrey Jowell & Dawn Oliver (edited), *The Changing Constitution*, 247.

Accountability Act 2014 amends Chapter 4ZA of part 1 of the Local Government Finance Act 1992, so that the key referendum principle takes account of levy increases in the future.[744] The Representation of the People Act 2000 has permitted councils to apply for permission to use alternative electoral arrangements to the traditional single day voting in person at polling station,[745]and the use of postal ballots, electronic voting, non-conventional polling stations such as supermarkets and doctors' surgeries have all been suggested as part of the electoral arrangements.[746] However, a view has been expressed that measures to reinvigorate local democracy will fall flat in practice unless councils regain control over local finance.[747]

4.3.2 Administrative Accountability Mechanism through Central Government

In terms of the administrative accountability mechanism through the central government, an obvious clue of the central control over local government finance could be easily inferred from the discussion on the vicissitude of local finance in England. From the 1830s onward, the central control over local finance may be roughly divided into two stages: the first one, from the modernization of local government between 1830s and 1890s till the reform of local government by the Labour government in 1997, underwent an increasing fiscal centralism; and the second one, from 1997 till the present time, seems to introduce some measures to empower local government and local finance, but it is still controversial to say the centralism of local finance is loosened.

As mentioned in the introductory section of this chapter, local authorities provided a small quantity of services before 1830s, and the money for the then services could be covered by the

[744] See the Explanatory Notes of the Local Audit and Accountability Act 2014.
[745] See the section 10 of the Representation of the People Act 2000.
[746] Jeffrey Jowell & Dawn Oliver (edited), *The Changing Constitution*, 247.
[747] ibid

locally collected rates. With the modernization of local government during the period between 1830s and 1890s, local finance saw a transformation from the local self-government to a strict control of central government,[748] and the trend of fiscal centralism was reinforced after the Second World War due to the influence of a welfare state. Generally speaking, the trend of central control was underpinned by the expansion and development of grants from central government, and compounded by the development of the role of local government in the delivery of public services; that is, local government undertook much more responsibilities in the provision of services which exceeded the capacity of locally raised revenue, and central government became involved in local finance through grants.[749] The early part of the twentieth century saw a transformation of the priority of grant aid, which shifted from the "equalization" of tax base to a nationwide guarantee of minimum level in the provision of services provided by various councils.[750] From the 1980s, besides the minimum level of services, central grants were used as a mechanism for setting a ceiling of local government spending through rate-capping, which was considered to be rooted in "the growing influence of macro-economic concerns about local expenditure and taxation[751]". By setting the maximum level of the local expenditure, central grant aid was used to strengthen or weaken the process of local accountability through the local tax,[752] known as "gearing[753]", which implied that the larger the quantity of local expenditure depended on central grants, the more unstable local taxation would be. However, the mechanism of "gearing" did not run well and local government "became caught in a vortex leading to an irresistibly increasing centralization of control[754]".

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[748] Michael Varney, *United Kingdom---Local Government in England*, 362.

[749] Maureen Schulz, *The Development of the Grant System*, in C. H. Wilson (edited), *Essays on Local Government*, (Oxford: Oxford Basil Blackwell 1948), 113.

[750] Sir James Lythgoe, *An address at a meeting of the Southern Boroughs' Association*, delivered on Friday, October 16th 1953, 13-16.

[751] Ian Leign, *Law, politics, and Local Democracy*, 105.

[752] ibid, 106.

[753] "Gearing" is the wording from Ian Leign in *Law, Politics and Local Democracy*, (Oxford: Oxford University Press 2000).

[754] Martin Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations*, (Oxford: Clarendon Press 1996), 141.

Rate-capping, introduced in the Rates Act of 1984, intensified the central control over local government finance. The Act authorized the Secretary of State to designate maximum standard of spending for councils whose expenditure was likely to breach the Grant Related Expenditure Assessment[755] in accordance with the principles determined by the Secretary of State. According to the Act, councils could challenge the deemed forecast of local expenditure by applying for redetermination, but the Secretary of State was entitled to further lower the level of deemed expenditure if challenged. In addition, Parliament always approved the decisions of the Secretary of State in the process of rate-capping, and this made it impossible for the councils to successfully challenge the mechanism via judicial channels, since Parliament is the best forum to deal with criticisms of the ministerial judgment[756]. Rate-capping was retained under the scheme of community charge and the Local Government Finance Act 1992, but the rigid control over local expenditure and the amount of local tax have witnessed some variations in the operation of the mechanism. During the financial year 1991/1992, central government stated its proposal for maximum levels of local spending before the local budgets were fixed, as a result, nearly all councils consciously limited their budgets to the framework of central proposals. The result has been that central government is satisfied with the situation that the overwhelming majority of local authorities exercised discretionary power judiciously.

During the second stage, new measures were introduced (discussed in 4.3.1), which seemed to ease the central control, but it is still not necessarily accurate to suggest that the central control over local finance has been reduced. In the first place, the basic fact that only 35 per cent of local revenue (as mentioned in 4.2.4) is now levied and collected by councils, makes it hard for local authorities to be independent bodies in terms of their financial viability, and they are still financially dependent on central government. The huge amount of grants continues to give central

[755] See the section 2 (2) of the Rates Act 1984.

[756] *R v Secretary of State for the Environment ex parte GLC and ILEA*; also see *R v Secretary of State for the Environment ex parte London Borough of Islington*.

government a considerable stake in the financial probity of local councils for the sake of national taxpayers[757]. Secondly, fiscal spending in local authorities occupies around a quarter of public expenditure,[758]and Whitehall is still concerned for the overall amount of local expenditure so as to ensure that public spending in local authorities should be "stable, predictable and consistent with its own economic policies and targets[759]". A referendum as an approach to the excessive increase of local tax has been introduced, but as discussed in 4.2.4, a significant degree of power is still with the central government, and the Secretary of State determines the principles of excessive increase which may trigger a referendum. Thus, the practical impact of referendum should not be overestimated, and only one referendum has taken place so far, and the result is negative. At the same time, local elections continue to produce either apathetic response or a judgement of the perceived restricted ability of local politician to influence major policy and expenditure decisions.[760] Although it has to be said that this view is contestable. In addition, there is still a trend of tighter control over local finance in practice. The Chancellor of Exchequer, George Osborne, has announced tougher control over the management of public money, and future governments must meet a "new balanced" budget targets (mentioned in 4.2.2).

Although there may appear to be two stages in respect of the central control over local finance, in fact the central government actually determines the revenue and expenditure in local authorities, which undermines the autonomy of local government through the measures of capping council tax and ring-fencing the expenditure funded by central grants. The trend of financial centralism may seem to contradict the 1985 European Charter on Local Self Government signed by the UK in 1997 and recognized as part of the domestic law in 1998. According to the Charter, (1) local authorities shall be entitled to adequate financial resources of

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[757] Ian Leign, *Law, politics, and Local Democracy*, 106.

[758] See Department for Communities and Local Government, Local Government Financial Statistics England, No. 25, 2015, at the official website https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444993/2904001_LGF_web_accessible_v0_2__final_.pdf (accessed on 09-11-2015)..

[759] Modernising Local Government: *Improving Financial Accountability*, Consultation Paper (London, 1998), para. 26.

[760] Tony Travers & Lorena Esposito, *The Decline and Fall of Local Democracy*, 25.

their own, which they may dispose of within the framework of their powers[761]; (2) the financial systems on which resources are available to local authorities shall be of sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks.[762] Obviously, the central control over local finance deprives local authorities of adequate financial resources of their own, which may be used to carry out their own tasks as a layer of government. Meantime, it should be noted that the courts have indicated that in applying the principles of *Wednesbury* unreasonableness, a low level of review is to be applied to decisions in the general area of social and economic policy, such as the control of central government over local government expenditure,[763] which was reflected in *R v Secretary of State for the Environment, ex p Hackney London Borough Council* and *Nottinghamshire County Council v Secretary of State for the Environment* (discussed in 4.2.3).

4.3.3 Administrative Judicial Accountability Mechanism through Local Government Ombudsman.

In England, a Local Government Ombudsman (LGO) works as a non-court based mechanism for holding local government accountable for their fiscal decisions. Generally speaking, public sector ombudsmen are independent bodies investigating complaints of maladministration against public bodies,[764] and a Parliamentary Ombudsmen was introduced in 1967 in the light of the Parliamentary Commissioner Act. A LGO was established in the Local Government Act 1974, and now there are three Local Commissioners in England. According to the Act, the main responsibility of a LGO is to respond to complaints of maladministration against councils and some other authorities and organizations, and the response is based on the investigation of the

[761] See the article 9 of the European Charter on Local self-Government.
[762] Colin Crawford, 'European Influence on Local Self-Government?' *Local Government Studies*, 18(1) (1992), 69-85.
[763] David Feldman QC, FBA & Andrew Burrows QC, FBA (edited), *English Public Law* (second edition), (Oxford: Oxford University Press 2009), 238.
[764] Mark Elliott & Robert Thomas, *Public Law*, (Oxford: Oxford University Press 2011), 607.

maladministration with a target that powers should be exercised by local government in a fair, humane and reasonable way.

The bodies subject to a LGO include local authorities and certain other local organizations, such as National Park authority, Fire and Police authorities. There is no explicit definition for maladministration in the relevant Act, and the meanings of the concept is subject to the interpretation of LGO's themselves and the officials in the central government. For instance, according to Mr. Richard Crossman, a former cabinet minister, maladministration is "bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness, and so on[765]". In 1993, the "Crossman Catalogue" saw an expansion, and in the view of the LGO, the range of "maladministration" also included "rudeness, unwillingness to treat the complainant as a person with rights, refusal to answer reasonable questions, knowingly giving advice which is misleading or inadequate, offering no redress or manifestly disproportionate redress, refusal to inform adequately of the right of appeal, faulty procedures, partiality, failure by management to monitor compliance with adequate procedures, etc. [766]". Both "Crossman Catalogue" and the list of acts of maladministration by the ombudsman contains an overlap with unlawful conducts, but they are not identical; in this sense, an ombudsman takes up the business of controlling administrative malpractice at the point where the law leaves off[767]. In 2001, the Commission for Local Administration in England re-printed (first published in 1993) its guidance on good administrative practice in local authorities, and 42 principles or axioms of good administration, together with some explanatory comments and illustrations. These principles may be split into eight groups under such headings as the law, policy, decisions, action prior to decision making, administrative processes, customer relations, impartiality and fairness, and complains[768] This

[765] HC Deb 18 October 1966, vol. 734, c 51.
[766] Parliamentary Ombudsman Annual Report (1993), HC 290 of 1993-1994, para 7.
[767] H. W. R. Wade and Franklin M. Schultz, The British Ombudsman: A Lawyer's View, *Administrative Law Review*, Vol.24, No. 2, 1972, P.137-153.
[768] Good Administrative Practice: Guidance on Good Practice, by the Commission for Local Administration in England (online), http://www.lgo.org.uk/information-centre/reports/advice-and-guidance/guidance-notes (accessed on 26-11-2015)

shows that more factors are included in the criteria of a good administration than may first be assumed, and maladministration may be indirectly defined if relevant requirements are not met according to the 42 principles.

A LGO is appointed by the Crown and should report to the Parliament on the following occasions: first, an annual report is required to show their own performance; secondly, a special report is written when injustice resulting from maladministration occurs, and relevant public body has no intention to redress it. On occasion when the Ombudsman sees fit, he (she) reports to the Parliament on other matters related to maladministration. The findings or recommendations in the report are not legally binding, and the Public Administration Select Committee of the House of Commons actually plays a role in pressing local authorities to accept the recommendations. In this sense, the role of an Ombudsman is largely considered to administrative justice, including the courts and tribunals[769]. At the same time, the salary of a LGO is funded by Parliament in order to ensure the independent status of a LGO in dealing with complaints, thus, an ombudsman is regarded as functioning as an extension of parliamentary scrutiny and control[770].

As part of the administrative justice, a LGO is easy accessed and the service costs nothing. The website http://www.lgo.org.uk/ works as an official platform for a citizen to know the ABC of a LGO and how to make a complaint. To illustrate how a LGO influences the exercise of local power, let us take the complaint from "Mr. North" (an incognito name for legal reasons) for example. Mr. North lives in an area administered by Thurrock Council, and the council charged him £400 for administering a council tax payment plan which was agreed as an alternative to making him bankrupt. Although Mr. North agreed to pay the £400 by instalments, he challenged the reasonableness of the amount and the legitimacy of the charge. The Ombudsman accepted the complaint, investigated, and concluded that "the Council was at fault in charging the £400

[769]Mark Elliott & Robert Thomas, *Public Law*, (Oxford: Oxford University Press 2011), 617.

[770] Colin Turpin & Adam Tomkins, *British Government and the Constitution: Text and Materials* (Sixth edition), (Cambridge: Cambridge University Press 2007), 623.

fee. There is no legislation which allows for the fee to be charged … and there appears to have been no scrutiny to ensure that the policy was legal.[771] " In the process of the investigation, Thurrock Council recognized that the charge has no legal basis, and announced a goodwill payment to residents who paid the charge. Based on recommendations from the Ombudsman, Mr. North was offered the £40 goodwill payment, and an additional £60 to reflect his time and trouble in dealing with the complaint. The Council introduced a procedure to ensure proper scrutiny should be exercised over all policies. [772] The investigation and the result of the case demonstrate that a LGO may act as an effective mechanism to hold councils to account for their fiscal policies and decisions; and if there is an indication of the abuse of power, a LGO may intervene in the process by responding to complaints from local residents.

However, there are limitations in the work of a LGO. In the first place, the investigation of the maladministration of local government is limited, and often falls short of the high expectations of the complainants, who might often want to overturn decisions.[773] The Ombudsman is not allowed to look at the merits of a governmental decision, taken in the exercise of the discretion vested in that authority[774]. In England, local government should be run directly by elected representatives; "looking at the merits of a decision" may impose the personal judgements of an Ombudsman on the political choice of a council. The LGO has no power to undertake an investigation on the following occasions:[775]

> (1) The subject matter of a complaint fall outside the jurisdiction of a LGO, or the complainant is not directly influenced by the maladministration of a local government, or a legal remedy has already been sought;
>
> (2) The time limit has been exceeded;

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[771] http://www.lgo.org.uk/decisions/benefits-and-tax/council-tax/thurrock-council-09-006-694 (accessed on 26-10-2015).
[772] ibid
[773] Richard Kirkham, 'A Complainant's View of the Local Government Ombudsman', *Journal of Social Welfare and Family Law*, Vol.27 (2005), 383-394.
[774] See the article 34 (3) of Local Government Act 1974.
[775] See part three of Local Government Act 1974.

(3) Alternative complaint mechanisms should be exhausted, prior to complaining to a LGO;

(4) Political disputes and public interest cases are not accepted by a LGO.

On the face of it there is no accountability mechanism imposed on the LGO, and no scrutiny is imposed on the individual reports by the LGO.[776] Although the local government ombudsmen report their general work to the Commission for Local Administration, this is arguably not adequate in making the LGO accountable for the individual investigations and reports. [777] What is more, the LGO has no power to enforce his (her) findings[778], and the complainant may therefore have difficulty in being protected under the circumstances. A case in point is how Trafford Metropolitan Borough Council disregarded the findings of a LGO:

The case is about a girl called Carly Wright, who was so disabled that her local government, Trafford MBC, had a legal obligation to offer care, and the complaint was centered on whether or not adequate care had been provided by the local authority. Carly's family did not agree about the facilities provided by Trafford MBC when she transferred from children's services to an adult center, and brought the girl home for family care. Trafford MBC, did not respond to the concerns of Carly's family, or provide an alternative place for the disabled girl, and the family made a complaint to the LGO. Maladministration was found on the grounds that the local authority failed to meet Carly's needs, and the LGO recommended: (i) the local authority pay the family £1000 per week for the family care and a further £3000 in recognition of the family's distress, anxiety and the time spent in pursuing the complaint[779]; (ii) an "independent, impartial, credible and comprehensive assessment" was made of the needs of Carly and of her parents[780]. However, Trafford MBC refused to pay the compensation to the family, although it did not question the

[776] Richard Kirkham, *A Complainant's View*, 383-394.
[777] ibid.
[778] Richard Kirkham, 'Explaining the Lack of Enforcement Power Possessed by the Ombudsman', *Journal of Social Welfare and Family Law*, Vol. 30 (2008), 253-263.
[779] Local Government Ombudsman in England 2008, cited from Richard Kirkham, 'Explaining the Lack of Enforcement Power Possessed by the Ombudsman', *Journal of Social Welfare and Family Law*, Vol. 30 (2008), 253-263.
[780] Richard Kirkham, *Explaining the Lack of Enforcement Power*, 253-263.

allegations of mistakes in Carly's care. The response of Trafford MBC in Carly's case may show that the recommendation of the LGO has no enforceable power if local authorities refuse to cooperate with the LGO findings.

In R. (on the application of Gallagher) v Basildon DC, the local authority's refusal to follow a recommendation of the LGO was claimed to be unlawful by the court. According to the judgement of *Gallagher*, it is not necessary for local government to provide "cogent reasons" for rejecting the recommendations of the LGO, but in the case of *Gallagher*, the council's refusal to follow such a recommendation was unlawful.[781] Therefore, the administrative judicial mechanism through a LGO seems to be a convenient approach to make local government account for their fiscal decision-making, the obvious weakness of the method, that is, the potential unenforceability of the findings by the LGO, and the lack of accountability mechanism LGO's individual investigation, may reduce the strength of this mechanism in making local authorities accountable for their decisions.

4.3.4 Social Accountability Mechanism through the Freedom of Information.

In a modern democracy, access to governmental information is an important mechanism which may help to make sure that public powers is exercised in a more and more open and accountable way. On the one hand, the freedom of information is a right of human beings, unless there is a legitimate reason to restrict it.[782] On the other hand, the freedom of information may work as a specific channel promoting governmental transparency, one of the basic principles of institutional rationality. In terms of local government finance, local authorities are funded by public money

[781] [2010] EWHC 2824.

[782]Patrick Birkinshaw, 'Freedom of Information and Openness: Fundamental Human Rights?' *Administrative Law Review*, Vol. 58 (2006), 177-218.

from taxpayers, and their decisions potentially affect the daily lives of citizens. In this sense, "unnecessary secrecy in government leads to arrogance in governance and defective decision-making[783]", while freedom of information helps local residents to improve their confidence and trust in councils by being better informed.

The Freedom of Information Act 2000, put into effect in 2005, is said to work as a significant part of the wider governmental agenda to increase openness, transparency, trust, and accountability in the public sector.[784]According to the FOIA, local authorities are in the range of public bodies obliged to publish recorded information or respond to requests for relevant information, including printed documents, computer files, letters, emails, photographs, and sound or video recordings; and any member of the public, whether journalists, local residents, foreign researchers, or public authority employees, is entitled to request relevant information from government bodies. Based on a report from the Justice Committee of House of Commons, the FOIA has become a vital element in opening up government and has resulted in the disclosure of significant amounts of information which might otherwise have gone unreleased. [785] The FOIA has put power in the hands of individuals seeking to be informed, which pushes the proactive transparency of public authorities in providing the public with what they ask for. According to the report, the increased openness and transparency has led to an increase in accountability----in improving the public understanding of government decisions, in improving the quality of decision-making, in improving the operation of authorities, and in improving public participation in decision-making.[786] Under the influence of the FOIA, financial transparency in councils has been improved and this will be discussed in the following paragraph.

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[783] White Paper, 'Your Right to Know: The Government's Proposals for a Freedom of Information Act', cm3818, (1998).
[784] Elizabeth Shepherd, Alice Stevenson & Andrew Flinn, 'Information Governance, Records Management, and Freedom of Information: A Study of Local Government Authorities in England', *Government Information Quarterly*, 27 (2010), 337-345.
[785] Post-Legislative Scrutiny of the Freedom of Information Act 2000, First Report of Session 2012-2013 by the Justice Committee of House of Commons (online), http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf (accessed on 12-11-2015).
[786] ibid

From June 2010, local government transparency has been pushed forward by an unprecedented project initiated by Eric Pickles, the Secretary of State for Communities and local Government. The target of the project is intended to reinforce scrutiny into local spending, greater efficiency and the accountability of local government[787]. Mr. Pickles took the lead in publishing all spending in excess of £500 in his own department since August 2010, and expected all local authorities to emulate his actions. In September 2011, the Code of Recommended Practice for Local Authorities on Data Transparency was published, and the basic stand was that "where public money is involved there is a fundamental public interest in being able to see how it is being spent, to demonstrate how value for money has been achieved or to highlight inefficiency[788]". The Code set out some principles, demand-led open and timely, as basic requirements for the release of public data. According to the principle, governmental expenditure over £500 and public payments (to any sole trader or body) over £500 are expected to be transparent; senior employees' salaries, name, job descriptions, responsibilities, etc. should be released as public data; the publication of data should be in open and machine-readable format which allows them to be opened and reused. Local Government Transparency Code 2014 sets out an even stricter standard for the release of public data. According to the Code, governmental information is divided into two categories, the information which must be published quarterly, annually, and once only, and the information which is recommended for publication. The catalogue of "must be published" comprises at least[789]:

(1) Details of individual items of expenditure exceeding £500;

(2) Details of every transaction on a Government Procurement Card;

(3) Details of every invitation to bid for contracts to provide goods (services)

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[787] Emily Carter, 'The New Code: the Next Step in Local Government Transparency', *Freedom of Information*, 10 (5) (2014), 6-8.

[788] The Code of Recommended Practice for Local Authorities on Data Transparency, ISBN: 978 1 4098 3110 5 DCLG Publications, September 2011.

[789] See part 2 of the Local Government Transparency Code 2014, ISBN: 9781409843245, from the official website https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/360711/Local_Government_Transparency_Code_2014.pdf (accessed on 16-11-2015).

with a value exceeding £5000;

(4) Details of any contract, commissioned activity, purchase order, framework agreement and any other legally enforceable agreement with a value exceeding £5,000;

(5) The number of employees whose remuneration in that year was at least £50,000 in brackets of £5,000, and details of remuneration and job title of certain senior employees whose salary is at least £50,000, and employees whose salaries are £150,000 or more must also be identified by name.

The Local Government Transparency Code 2014 was replaced by the Local Government Transparency Code 2015, but the requirements for the catalogue which must be published were not lessened. In the future, the publication of governmental information in local authorities is estimated to be reinforced, and emphasis is to be placed upon the standardization and improvement of the format in which data are published and simplifying the approach to accessing governmental data.[790]

In general, the FOIA and relevant Codes work well, but this does not mean the social accountability mechanisms in local government finance is a perfect channel to an accountable council. There are limitations in the disclosure of fiscal information in local authorities. Although the FOIA has presented a legitimate foundation for the disclosure of local government fiscal information, a Local Government Transparency Code is a product by the central government, or to be exact, a department of central government (department for Communities and Local Government). As noted in the above paragraph, the Local Government Transparency Code 2014 and 2015 provide some strict requirements for the disclosure of fiscal information. However, both of the two codes are administrative documents, which are issued by a department of central government, and the project of freedom of information in local finance, is also dominated by officials working in the same central government department, especially Mr. Eric Pickles, the

[790] Emily Carter, *The New Code*, 6-8.

Secretary of State for Communities and Local Government. Thus, there seems to be a sign of central intervention in the disclosure of local government fiscal information, and this may raise two questions. On the one hand, the strict requirements for the publication of fiscal information may lack a stable foundation in legislation, or may be changed according to changes in central government policies; on the other hand, a possible trend of central control in this field may be caused, especially under the fiscal dependency of local finance upon the central government and the predominant administrative mechanism through the central government. In the meantime, the cost of disclosing fiscal information in local government should be taken seriously. The constitution unit of the UCL estimated the cost of publication of fiscal information in local authorities at £31.6 million in 2010.[791] Although the benefits arising from the right to access information cannot be quoted, the amount of money accounting for part of local expenditure, cannot be overlooked. This may raise a new project on the reconcilement of saving money and the deepening of information disclosure in the future.

In brief, freedom of information gives the public a right to access information about the way public bodies in England (and Wales) are governed, and the way taxpayers' money is spent. Governments and public authorities may promote greater transparency but, without FOI requests, decisions on what to publish will always lie with those in positions of power. FOI has costs, but it has potential to save expenditure which accrue from the disclosure of inappropriate use of public money or, more importantly, fear of such disclosure.

4.3.5 Legal Accountability Mechanism through Judicial Review.

In England judicial review serves as a check on the powers wielded by public bodies. In the post-war era the mechanism of judicial review is said to be largely encouraged by judges, the reasons

[791] Anna Colquhoun, *The Cost of Freedom of Information*, Constitution Unit, University College London, December 2012, http://www.ucl.ac.uk/constitution-unit/research/foi/countries/cost-of-foi.pdf (accessed on 10-11-2015).

being the expansion of the executive role during the second half of the twentieth century.[792] In the landmark case *Council of Civil Service Union v Minister for the Civil Service*,[793] Lord Diplock presented the grounds for judicial review as being illegality, irrationality and procedural impropriety.[794] According to Lord Diplock, illegality means the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it;[795] irrationality may be briefly referred to as *Wednesbury* unreasonableness (*Wednesbury* was touched in 4.2.2 and will be discussed in 4.4.2), or public body's decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it[796]; and the procedural impropriety is described as "fundamental fairness[797]", including the failure to observe basic rules of natural justice, the failure to act with procedural fairness towards the person who will be affected by the decision, and the failure by an administrative tribune to observe procedural rules.[798]

The Human Right Act 1998 developed the traditional grounds of the rule of law by introducing a requirement to consider the "proportionality" of relevant decisions. According to proportionality, what is being lost or restricted in a measure attempting to meet a legitimate aim must be in proportion with its aim, this means proportionality allows governmental decisions to be scrutinized in greater depth than irrationality.[799] The main difference between irrationality and proportionality was discussed in a leading case----*R(on the application of Daly) v Secretary of State for the Home Department*[800], which may be described briefly: when a governmental

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[792] Lisa Webley & Harriet Samuels, *Public Law: Text, Cases, and Materials* (second edition), (Oxford: Oxford University Press 2012), 416.
[793] [1985] AC 374.
[794] Lisa Webley & Harriet Samuels, *Public Law*, 416.
[795] ibid
[796] Maureen O'Brien & Thomson Reuters, Judicial Review (online), an Insight from Westlaw http://login.westlaw.co.uk/maf/wluk/app/document?&srguid=i0ad82d080000015168cc495bf69314d5&docguid=I03C85A30C9E211E2817BBE8A82975263&hitguid=I03C85A30C9E211E2817BBE8A82975263&rank=11&spos=11&epos=11&td=51&crumb-action=append&context=65&resolvein=true (accessed on 19-11-2015).
[797] R. v Panel on Takeovers and Mergers Ex p. Datafin Plc, [1987] QB 815.
[798] [1985] AC 374.
[799] D. Feldman, *Civil Liberties and Human Rights in England and Wales*, (Oxford: Oxford University Press 2002), 57.
[800] [2001] 2 AC 532.

decision or policy is challenged through the mechanism of judicial review under the section 6 of the Human Rights Act 1998, it is proportionality that should be taken into consideration; in a non-human rights cases, it is irrationality that should the correct ground of relevant review.

In the constitutional context of England, the mechanism of judicial review must be under two pillars of the constitutional law, Parliament Sovereignty and the rule of law. This means, on the one hand, the courts have duties to give effect to the statutes agreed by Parliament, and have no power to repeal them even if they appear to conflict with constitutional principles[801] (although they may declare measures incompatible with the European Convention on Human Rights after the enactment of the Human Rights Act 1998). Therefore, the constitutional basis of judicial review is said to be the *ultra vires* doctrine,[802] that is, courts derive their powers from carrying out Parliament's intention by interpreting statutes, and ensuring that public authorities do not exceed their legal powers and act *ultra vires*.[803] On the other hand, public bodies should be answerable for the lawfulness of their decisions. This call to account can be through the mechanism of judicial review in the light of the rule of law. Thus, judicial review provides an approach, through which the ordinary citizens may demand public bodies explain the legal basis for their decision-making.[804]

From the perspective of the separation of powers (which will be explored in 4.4.2 as one of the constitutional rationales underlying the accountability mechanisms), in the English context, it is the function of Parliament to pass legislation, it is the function of the executive to decide policy and make decisions in the light of Parliamentary statutes,[805] and it is the function of the courts to strike an intricate constitutional balance between the legislative and the executive powers.[806]

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[801] Gabriele Ganz, *Understanding Public Law (third edition)*, (London: Sweet & Maxwell 2001), 5.
[802] ibid
[803] Lisa Webley & Harriet Samuels, *Public Law*, 419.
[804] Lisa Webley & Harriet Samuels, *Public Law*, 419.
[805] ibid, 420.
[806] M. Fordham, *Surveying the Grounds: Key Themes in Judicial Interventions*, in P. Leyland & T. Woods (edited), *Administrative Law Facing the Future: Old Constraints and New Horizons*, (London: Blackstone 1997), 186.

However, one of the consequences of the separation of powers is that there are some governmental powers, including national security, defense and foreign affairs, which the courts are reluctant to review,[807] and this may be seen as the limitations of the judicial review mechanism. In *Associated Provincial Picture Houses Ltd* v. *Wednesbury*, the courts developed the principle of *Wednesbury* unreasonableness, and through a complex reasoning process it became clear that the courts should generally defer to administrative decisions and only intervene in the extreme basis that the impugned decision was so unreasonable that no reasonable authority could ever have arrived at it.[808] Against this background, the judicial mechanism was criticized as having lost its strength to provide any satisfactory solution to the problem of keeping the executive under proper control.[809]

In terms of local finance, the mechanism of judicial review provide an approach which may respond to the potential abuse of power in respect of fiscal policies and decisions,[810] or as a check of fiscal power in local authorities. But there are limitations which should not be ignored. Here are some cases to illustrate the function and limitations of judicial review in local government finance. The first case is *Bromley LBC v Greater London Council*, which was discussed in 4.2.3. *Bromley* is associated with financial conflicts between different councils, which originated from policy decided upon by the Greater London Council, and the controversy was settled through the judicial review. The details of the case are worth re-iterating. The Greater London Council intended to reduce bus and tube fares by a quarter, and this would lead to a fiscal loss of £120 million every year. To make up for the deficiency a supplementary rate was proposed, and would be levied on all the London boroughs. *Bromley*, one of the boroughs, launched a judicial review to challenge the legality of the policy by the Greater London Council. The court concluded the

[807] Lisa Webley & Harriet Samuels, *Public Law*, 420.
[808] Mark Elliott & Robert Thomas, Public Law, 2011, *Oxford University Press*, P. 566.
[809] Kenneth Culp Davis, The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence, *Columbia Law Review*, Vol. 61, No. 2 (Feb., 1961), P.201-220.
[810] C. T. Emery & B. Smythe, Judicial Review: Legal Limits of Official Power, 1986, *Sweet & Maxwell*, P.14.

policy was illegal[811]: on the one hand, the decision to cut fares totaled £120 million per year, an arbitrary figure, was *ultra vires*; on the other hand, cutting fares might contradict the duty of providing an efficient and economic service at reasonable price for the public, and at reasonable cost for the ratepayers. The court were required to judge the fiscal decisions of the local authority in *Bromley*, and the positive function of the judicial review, as a check of the fiscal power of local government, was demonstrated in this case. The court gave a clear judgement on whether or not the fiscal decision of the Greater London council was in accordance with the authorized power of the Parliament, and concluded that the policy of the Greater London local authority was *ultra vires*, and illegal. Secondly, the potential for the abuse of fiscal power in Greater London Council had to cease, due to the conclusion of the court. This means that the practical result of judicial review serves as a mechanism to hold local authorities to account for the legal basis of their fiscal policies.

The other case is *Regina (on the application of Moseley (in substitution of Stirling Deceased)) (AP) (Appellant) v London Borough of Haringey*. This is not a landmark case neither is a famous one, but it represents the functions of the judicial review as an accountability mechanism in checking the fairness and lawfulness of fiscal decision-making in local authorities, and this function may relate closely to one of the limitations of this mechanism. The London Borough of *Haringey* decided to replace Council Tax Benefit (CTB) with a Council Tax Reduction Scheme (CTRS) according to the Welfare Reform Act of 2012, and this would probably lead to a reduction of benefit payments ranging from 18% to 22%. Regina and Stirling were single mothers who resided in *Haringey* and did not have to pay council tax under the conditions of CTB. The two single mothers appealed to review the fairness the CTRS and lawfulness of the decision-making procedure on the ground that the consultation was unlawful, because insufficient information was provided for the consultees. The dispute in this case was seen by the court as one concerning

[811] [1983] 1 AC 768.

political issues;[812] this meant that the court refused to give a clear judgement about the legality or illegality of the fiscal decision-making, the underlying reason being that the matter rests with the political feature of governmental decision in question. The case of *Moseley* may show the functions and limitations of judicial review, as one of the accountability mechanisms in local finance in England. In the first place, *Moseley* concerns with a statutory duty of consultation for local authorities, the purpose of which is to ensure public participation in decision-making process.[813] In fact, the realization of this duty involves the procedure fairness of decision-making, and *Haringey* council failed to meet relevant requirements. Judges announced the unlawfulness of *Haringey*'s consultation on its council tax reduction scheme, in the process, *Haringey* local government was made to account for its fiscal decision about council tax reduction scheme. Secondly, the reason why *Moseley* is a positive judicial treatment may reveal one of the limitations of the judicial review mechanism, it tends to focus on the procedural legitimacy of fiscal decisions. Due to the political question doctrine, judicial mechanism could not challenge the reasonableness of the political decisions by the representative government,[814] and this point has been subtly demonstrated in the judgement of the *Moseley*, which was irrelevant to politics. In fact, it is very difficult to completely distance the political issues from the exercise of public powers, and policies or decisions in local government finance may easily bear a political feature of some kind. Thus, political issues may become an excuse when the courts are reluctant to express their viewpoint about some policies or decisions in this field.

Besides the political question, other limitations of judicial review can be inferred from the above two cases:

> (1) Judicial review depends upon the complaint of relevant citizens, or public bodies, and the court has no power to actively review a fiscal decision by

[812] [2014] UKSC 56.
[813] ibid
[814] Martin R. Redish, 'Judicial Review and the Political Question', *Northwestern University Law Review*, Vol. 79 (1984), 1031-1061.

local authorities.[815] In the two cases, *Bromley* and *Moseley*, the courts check the fiscal actions of local authorities, but only on receiving a complaint from the complainant. The courts have no power to call an authority to account without a complaint, even if the authority was blatantly acting improperly.

(2) Judicial review is expensive, and the complainant may, in the first instance, have to pay his own costs.

(3) Judicial review is time-consuming, and it may take a long time to get the final judgement from the court. In *Moseley*, the Court of Appeal made the judgement on 22nd February 2013,[816] and the Supreme Court gave the final judgement on 29th October 2014.[817] It took nearly two years for the two residents to get the final answer from the courts.

Overall, the impact of judicial review as a kind of accountability mechanism should not be overestimated or underestimated. It is truly a mechanism to check the exercise of fiscal power in local government, and the mechanism may perform a role in some cases, like *Bromley*. The process has a main obstacle involving the political question, which may curtail judicial intervention, as in *Moseley*. With the introduction of the Constitutional Reform Act 2005, significant changes, including the replacement of the Lord Chancellor by the Lord Chief Justice as the head of the judiciary, the establishment of the Supreme Court,(although it has to be remembered that the Supreme Court is only a new name and location for the Judicial Committee of the House of Lord) have taken place, and this is regarded as having strengthened judicial independence[818] and may lead to changes in the legal accountability mechanism through judicial review (will be further discussed in 4.4.3).

[815] J. Skelly Wright, 'The Court and the Rulemaking Process: the Limits of Judicial Review', *Cornell Law Review*, Vol. 59 (1973), 375-397.
[816] [2013]EWCH Civ 116; [2013] PTSR 1285.
[817] [2014] UKSC 56; [2014] 1 WLR 3947.
[818] Robert Hazell, 'Judicial Independence and Accountability in the UK have both emerged Stronger as a Result of the Constitutional Reform Act 2005', *Public Law*, Apr. 2015, P.198-206.

4.3.6 A Combination of Administrative, Legal and Social Mechanisms through Audit.

Besides the above mechanisms, the operation of local finance in England is subject to the auditing system which is performed on an annual basis. The history of auditing local government finance can be dated back to the introduction of a district auditor, in the light of the Poor Law Amendment Act 1834.[819] The Local Government Act 1972 revised the auditing system, which was based on the Poor Law Amendment Act 1834; both district auditors, appointed by the Secretary of State for the Environment, and approved auditors from private practice, appointed by local authority and approved by the Secretary of State, may audit the probity and regularity[820] of local government finance.[821]The duties were carried over by the audit commission, established in accordance with the Local Government Finance Act 1982. From the legal point of view, the audit commission was a public corporation, responsible for the protection of the public purse[822] by carrying out a performance audit as well as a financial audit. According to the schedule 2 of the Local Audit and Accountability Act 2014, the audit commission was abolished; local auditors, appointed by an audit panel, are now in charge of auditing local and focused far more on the financial aspect[823].

First, the original purpose of auditing local finance rested with the examination and verification of the factuality, accuracy and legality of local accounts in line with the principle of *ultra vires*,[824] and this purpose remains a feature of the work of the auditors. Secondly, in an inquiry into the local government finance, the *Layfield* Committee presented a second target for auditing, that is,

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[819] Jeremy Smith, 'Poor Law and Bad Law--- the End of Surcharge', *Journal of Government Law*, 3.03 (2000), 38-40.
[820] See the article 154 (1) of the Local Government Act 1972.
[821] F. Layfield, *Report of the Committee of Inquiry into Local Government Finance*, Cmnd 6453(1976), 93-95.
[822] See the official website of the audit commission at http://webarchive.nationalarchives.gov.uk/20150421134146/http:/www.audit-commission.gov.uk/ (accessed on 29-02-2015), which was closed with the repeal of the audit commission in March 2015.
[823] See section 20 of the Local Audit and Accountability Act 2014.
[824] Ian Leigh, *Law, Politics and Local Democracy*, 115.

"value for money".[825]The position of the *Layfield* Committee was demonstrated in the status and role of the introduction of the audit commission[826], although the judgment of "value" depended more upon market rationality[827]. The Local Government Act 1992 legally confirmed the standpoint of the *Layfield* Committee by stressing that the auditor is required to satisfy himself that proper arrangements have been made for securing economy, efficiency, and effectiveness in the use of public resources,[828] and the indicators, economy, efficiency and effectiveness, set a higher requirement in managing public money in local government and providing public services. Then, in 1997, the Labour government introduced the concept of "best value", which replaced "value for money", and the quality of local finance was highlighted in the light of the best value. The Local Audit and Accountability Act 2014, which repealed the Audit Commission Act 1998, reiterated that local audit should include the element of "value for money",[829] which is regarded as reflecting a concern for more transparency and accountability in spending public funds, and for obtaining the maximum benefit from the resources available[830]. However, the Act stressed the financial aspect rather than the performance of authorities, as mentioned in the previous paragraph. Now, it is too early to evaluate the functional change of auditors, although it may indicate the loosening of central control. In addition, with the expansion of local functions against the development of the welfare state, more and more local expenditure had to be funded by grants from central government; this led to a further target of audit, which is said "to ensure that funds voted by Parliament through the grant mechanism have been properly used[831]". Due to the latter function, the system of local audit services acts as a mechanism which protects the interests of not only local taxpayers and electors but also of those who contribute to the money collected by

[825] Ibid, 116.

[826] Mike Radford, 'Auditing for Change: Local Government and the Audit Commission', *The Modern Law Review*, Vol.54 (1991), 912-923.

[827] ibid

[828] Rowan Jones & Maurice Pendlebury, *Public Sector Accounting (Fifth Edition)*, (London:Pearson Education Limited 2000), 238.

[829] See the section 20(1) of the Local Audit and Accountability Act 2014.

[830] Chris Barnett, Julian Barr, Angela Christie, Belinda Duff, and Shaun Hext, 'Measuring the Impact and Value for Money of Governance & Conflict Programmes (final report)', December 2010, https://www.bond.org.uk/data/files/Itad-2010_vfm-report.pdf (accessed on 19-11-2015).

[831]Ian Leigh, *Law, Politics and Local Democracy*, 106.

central government as central revenue.

The targets are satisfied through legal and administrative arrangements, including the independence of audit process undertaken by independent local auditors, the statutory powers enjoyed by them, and the potential sanctions upon relevant officers. In the first place, the independence of audit, a distinguishing feature of any audit system, has been the main concern of relevant legislation, from the Audit Commission Act 1998 to the Local Audit and Accountability Act 2014. Under the Audit Commission Act 1998, independent audit includes the level of individual auditors and the level of audit commission. In terms of individual auditors, they were appointed by, and accountable to the Audit Commission. In terms of the Audit Commission, the independence, involved in financial and organizational levels, was as follows:[832]

> (1) The audit commission was self-funded through the audit fees, paid by the audited authorities;
>
> (2) The audit commission could not be regarded as a Crown body, and the auditors working for the audit commission could not be regarded as the Crown servants. Thus, the audit commission and the auditors are independent of ministers. The demonstration of the independent status of the Audit Commission rests with its duties in checking the economy, efficiency and effectiveness of public spending.[833]

But there were some factors which seem to limit the extent of the independence of the audit commission: (i) the members and chairman of the commission were appointed by the Secretary of the State[834]; (ii) the chief officer of the audit commission was appointed by the Secretary of the State[835]; (ii) the audit commission was subordinate to the directions of the Secretary of the

[832] See the para. 2, schedule 3 of the Local Government Finance Act 1982.
[833] See the section 35 of the Local Audit and Accountability Act 2014.
[834] See the section 11 of the Local Government Finance Act 1982.
[835] See the para.7, schedule 3 of the Local Government Finance Act 1982.

State in the discharge of functions[836]. Under the Local Audit and Accountability Act 2014, the Audit Commission was abolished, and more power seems to be devolved to the local audit regimes in the light of the Act. Local auditors are appointed by relevant local authorities, and the appointment is required to be based on consultation with its audit panel whose advice must be taken into account; this means that the appointment of local auditors will be the responsibility of local authorities, on the premise that the eligibility criteria are met. Thus, the audit panel seems to play a key role in the maintenance of an independent audit in local finance in accordance with the Act. On the one hand, most of the panel members should be individuals who have not been members of the audited body for over five years or have other relevant connections[837]; on the other hand, the panel should be responsible for the independent relationship between the auditors and the audited bodies[838]. It is too early to evaluate the implementation effect of the Act and the local audit regime based on the Act, and the independent status of local auditors is not clear at least at present time.

In any event, local auditors perform their functions in accordance with relevant Parliamentary Statutes, which authorize their auditing work. Under the Audit Commission Act 1998, auditors were required to work consistent with a *Code of Practice* written in the 1998 legislation; and the 2014 legislation provides *Codes of Practice and Guidance* for local auditors to follow. To guarantee the duties authorized by the Local Audit and Accountability Act 2014 could be carried out smoothly, local auditors are entitled to inspect, copy and take away relevant documents of the authorities, and to declare the unlawfulness of items in the local accounts[839]. At the same time, a local auditor has the statutory power to apply for judicial review of a decision of relevant authority, or of a failure by that authority to act, which it is reasonable to believe would have an effect on the accounts of that body[840]. When an item of local account is "contrary to law" in the

[836] See the para.3, schedule 3 of the Local Government Finance Act 1982.
[837] Melanie Carter, 'Going Going Gone', *Local Government Lawyer*, 03-12- 2015.
[838] ibid
[839] See the section 22, 28 of the Local Audit and Accountability Act 2014.
[840] See the section 31 of the Local Audit and Accountability Act 2014.

opinion of the local auditor, and the fact of "contrary to law" is confirmed by the High Court, a relevant officer or member of the authority is ordered to repay fiscal loss. In addition, surcharge and disqualification were applied as penalties for relevant officers or councilors. According to the Audit Commission Act 1998, surcharge may be imposed on officers or councilors who incur relevant loss as a result of "willful misconduct"; the surcharge should be subject to an appeal in the High court, and if the amount exceeds 2000 GBP, relevant councilors are automatically disqualified from their posts for five years. It should be noted that the "prohibition notice" for unlawful expenditure, made by the auditors, had once been questioned by the *Widdicombe* report. Local authorities are the only elected bodies under Westminster, and local auditors are not elected by local voters, instead they are just appointed by the audit commission or local authorities. The existence of "prohibition notice" is considered to have confused the accountability of elected bodies and that of non-elected institutions. With the implementation of "advisory notice" for unlawful expenditure, councils can overturn viewpoints from local auditors after considering the "advisory notice"[841], and this is regarded as to restoring the responsibility with the authority itself[842]. Overall, the auditing system is an effective mechanism to make local government accountable for their fiscal decisions, and to promote public service in local government; the independence of the local auditors is a situation which enhances the audit mechanism.

4.3.7 Private Law Accountability Mechanism through Contracting out Local Services.

Local authorities in England have become subject to accountability under private law as a consequence of the transformation of local government and the changing role of local authorities. According to John Stuart Mill, the rationale of local government stemmed from the position that

[841] Ian Leign, *Law, Politics and Local Democracy*, 12.
[842] Michael Supperstone, 'Local Authorities and Audits: Challenges to Auditors: New Frontiers', *Journal of Local Government Law*, 6.03 (2003), 62-67.

local government provided the public with the forum of political participation and democratic education in the process of government operations. The *Widdicombe* report argued that the value of the only elected layer of government below Parliament rests with its three attributes of:

(1) Pluralism, through which it contributes to the national political system;

(2) Participation, through which it contributes to local democracy;

(3) Responsiveness, through which it contributes to the provision of local needs through the delivery of services. [843]

Based on, and guided by the above rationale or values, traditional local government worked as direct providers of services. After 1979, especially between 1980s and 1990s, some significant functions which were previously undertaken by councils were transferred from councils to other agencies, and a number of services which were directly provided by councils have been 'contracted out', to the private sectors. This trend was a part of the Conservative government policy for local government, which was intended to reduce the role of local authorities as the direct providers of services.[844] The transformation was carried out through Compulsory Competitive Tendering (CCT), introduced by the Planning and Land Act 1980, and the Local Government Act 1988. The CCT required a number of services, involving refuse collection, cleaning, catering for school and welfare purposes, vehicle maintenance and management, housing management, etc. to be open to competitive tendering by the private sector for the provision of services.[845]In the process, local finance should be accounted for consistent with private law accountability to meet contractual obligations, and it is becoming difficult to distinguish local authorities from other kinds of public sector body.[846] The transformation of local authorities from direct providers to the enablers of services in their jurisdictions, and the

[843] The Conduct of Local Authority Business: Report of the Committee of Inquiry into the Conduct of Local Authority Business, Cmnd 9797 (1986).

[844] David Feldman QC FBA & Andrew Burrows QC FBA (edited), *English Public Law* (second edition), 2009, *Oxford University Press*, 207.

[845] ibid

[846] David Feldman QC FBA & Andrew Burrows QC FBA (edited), *English Public Law*, 207.

fiscal accountability mechanism which arose from the changes, are briefly described, rather than discussed in detail in this section. As discussed in chapter 1, the purpose of this thesis is to deal with Chinese issues concerning local government finance, and the constitutional comparison between mainland China and England serves as an illustration of Chinese issues. There is no similar trend to devolve services to private sector in mainland China, and this mechanism will not be employed to illustrate Chinese issues in the following chapter.

4.4 Constitutional Rationales underlying the Accountability Mechanisms.

4.4.1 Informal Status of Local Government.

This section first examines the constitutional status of local authorities as one of the underlying factors in the English constitutional context, and is the first comparator between China and England. As discussed in chapter 1, this thesis intends to deal with Chinese issues arising from the exercise of fiscal power in local government, and a constitutional comparison between the two countries is employed to help examine relevant issues and to seek some explanations for the deep-rooted nature of Chinese problems, and try to identify a way forward. This, in a sense, is the reason that constitutional theories in England have been selected, in the hope that they exhibit commonality of problems. As discussed in chapter 2, mainland China has a written Constitution, but the Constitution provides local government with an ambiguous status, and this ambiguity has resulted in buck-passing of fiscal expenditure from the central government to local authorities in the light of the revenue-sharing scheme. In this sense, the constitutional status of local government in England is relevant to the comparisons in chapter 5, and be included in the exploration of the constitutional backdrop in England.

The second consideration relates to the weak status of local government in England, and this has

produced an insecure position of local finance. Generally speaking, local authorities grow in a constitutional "environment" characterized as "unwritten", and the "unwritten" constitution has been evolving since 1215, when Magna Carta was signed.[847] Outwardly, structures and functions of local government have been changing during the historical process, especially after the modernization period (discussed in 4.2). However, the constitutional status of local government has not been changed at all, for a codified Constitution is still unavailable, although there is a debate both in the academic circle and the Parliament about what needs to be included in a codified Constitution.[848] The "unwritten" constitution provides local authorities with no formal definition of their position and functions. It is the informal nature of local government in constitutional law that, makes local authorities vulnerable to the Parliament statutes, which can choose to alter the functions of local government, abolish local government or a layer of local authorities when it sees appropriate. A case in point is the abolition of the Greater London Council and the metropolitan county councils in the light of the Local Government Act of 1985.[849] The vulnerability of local government leads to the fact that no formal measures in constitutional law can safeguard the institutions, conducts and functions of local authorities. The precarious status, to some extent, illustrates the vulnerability of local finance in England, which is subject to ring-fencing and rate-capping as demonstrated in the vicissitudes of local finance in 4.2 and discussed in 4.3.2.

It should be noted that the Localism Act 2011, discussed in 4.2.2, has introduced a general power of competence to councils, and the s. 2(2) (b) of the Act seems to provide a protection from implied repeal on the boundaries of general power----the general power does not enable a local

[847] R.C. Van Caenegem, 'Constitutional History: Chance or Grand Design', *European Constitutional Law Review*, 5.03 (2009), 447-463.

[848] Arvindh Rai,' British Pursuit for a Codified Constitution', *Manchester Review of Law, Crime and Ethics*, No.3 (2014), 1-9; Stephen Hockman & Vernon Bogdanor, 'Towards a Codified Constitution', *Justice Journal*, 7.01 (2010), 74-87. Besides, the Political and Constitutional Reform Committee was established in the Parliament, and the Committee launched a major consultation on the issues and ideas involving in creating a written constitution for the UK------a New Magna Carta in July 2014 (online), at http://www.parliament.uk/business/committees/committees-a-z/commons-select/political-and-constitutional-reform-committee/news/magna-carta-competiton-winners/ (accessed on 28-10-2015).

[849] Dawn Oliver, *Constitutional Reform in the UK*, 2003, (Oxford: Oxford University Press 2003), 295.

authority to do anything which the authority is unable to do by virtue of a statutory limitation which is expressed to apply: (1) to the general power, (2) to all of the authority's power, or (3) to all of the authority's powers but with exceptions that do not include the general power. This "implied repeal" does not overturn the weak status of local authorities which have no formal protection from a codified Constitution, for there is potential that the Localism Act 2011 made by the Parliament will be replaced or repealed by a new act which takes away this implied protection.

4.4.2 The Rule of Law.

4.4.2.1 The Meanings of the Rule of Law.

In England, the rule of law works as one of the two pillars of the uncodified constitution (Parliament sovereignty being the other one), and stems from the expression coined by Albert Venn Dicey in *Introduction to the Study of the Law of the Constitution* in 1885. Dicey gave the rule of law three meanings as:

> *(1) "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner ...[850]";*
>
> *(2) "no man is above the law…… every man is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals[851]";*
>
> *(3) "……the general principles of the constitution are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts[852]".*

Dicey provided fundamental principles for the exercise of governmental power through the above

[850] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (eighth edition), (London: Macmillan and CO. Limited 1920), 183-184.
[851] ibid, 189.
[852] ibid, 191.

classical meanings: (i) Powers should be authorized by Parliament, and no power could be above the statutes;[853] (ii) Power should be exercised in strict accordance with laws by Parliament. Here, Dicey underestimated both the existence of discretionary power, which existed at the time when he was writing; and the fact that such discretionary power was often a necessary and legitimate consequence of the growth of governmental power in the nineteenth century.[854] Dicey's theory was formed in Victorian era, when few citizens were permitted to enjoy Parliamentary franchise (mentioned in 4.2.1), and relatively fewer functions were undertaken by governmental bodies, whether at central or local levels, and these factors influenced the formulation of the concept of the rule of law as a constitutional principle. Dicey was an advocate of the *laissez-faire* approach to economics and individual liberty, and he rejected the increasing functions of government in social administration due to the potential infringement of the individual rights.[855] In this sense, the Diceyan version of the rule of law points towards market liberalism and the importance of individual freedoms. Whether or not the promulgation of subordinate legislation, at the discretion of the administration, contradicts with the rule of law, was clarified by the Donoughmore Committee in 1930s. According to the Committee, in an increasingly complex society, it is reasonable and inevitable for Parliament to confer powers to ministers to exercise in behalf of the public. [856] (iii) The role of judicial branch should be emphasized, and the exercise of power should be challengeable in the courts.

This means the courts should enjoy the authority to determine whether power is exercised by local government in line with the Parliamentary statutes. In the process, the question of formal / substantive conception of the rule of law may be raised. There is no doubt that the rule of law should be interpreted both in a formal and a substantive way, but in Dicey's theory a formalistic

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[853] Helen Fenwick & Gavin Phillipson, *Text, Cases and Materials on Public Law and Human Rights* (third edition), (London: Routledge 2011), 85.

[854] Paul P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law*, autumn (1997), 467-487.

[855] Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist*, (Chapel Hill: The University of North Carolina Press 1980), 22.

[856] See Report of the Committee on Ministers' Powers (Donoughmore Committee), Cmd 4060, 1932.

rather than substantive meaning of the rule of law may be stressed.[857] However, whether it is formal or substantive, some basic power principles were subtly elaborated by Dicey. He suggested that power exercised by officials should be authorized and be open to challenge in the ordinary courts; public bodies should comply with laws just as an ordinary citizen does. Thus, the rule of law, as a constitutional principle, may be considered as being the opposite of the arbitrary exercise of power, and a judicial check is required to ensure the legitimacy of powers. It should be noted that Dicey did not stress the independence of judiciary, which is seen, by most of the later commentators, as being a prerequisite of the rule of law.[858]Joseph Raz presented, in *The Rule of Law and its Virtue* in 1977, some minimum requirements for the law and judicial procedure, amongst them were the independence of the judiciary and the review power of the courts[859].

The inherent and historical limitation of the concept of the rule of law is destined to result in criticism, and the first critique focused on Dicey's misunderstanding on whether or not English and French officials were differently treated in the common law system and the civil law system. According to William Robson, the fact that ordinary citizens and governmental officials enjoyed "colossal distinctions[860]" in terms of rights and duties in England, had been neglected by Dicey. Governmental organs enjoyed special rights, special exemptions, even special immunities, while private individuals (or bodies) were deprived of some relief measures in many cases where they most required it against the official prerogative[861]. At the same time, the *droit administratif* in France was not a specific shelter for officials, on the contrary, "it allowed experts in public

[857] Trevor R. S. Allan, *Law, Liberty and Justice, the Legal Foundations of British Constitutionalism*, (Oxford: Clarendon Press 1993), 46. Also see Paul P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework', *Public Law*, No. 3 Autumn (1997), 467-484.

[858] Lisa Webley & Harriet Samuels, *Public Law: Text, Cases, and Materials* (second edition), (Oxford: Oxford University Press 2012), 89.

[859] Joseph Raz, *The Rule of Law and Its Virtue*, in Aileen Kavanagh & John Oberdiek (edited), *Arguing about law*, (London: Routledge 2009), 181-192.

[860] W. A. Robson, *Justice and Administrative Law* (second edition), (Rochford: Stevens & Sons Ltd. 1947), 343.

[861] ibid, 345.

administration to work out the extent of official liability[862]". Dicey's attitude to discretionary power was attacked in the 1930s by those who believed in the irreplaceable role of government in terms of social welfare and public services, and the critics included Professor William Ivor Jennings[863]. According to Dicey, two sets of rules, a broad set and a strict set, was identified in the English constitutional rules. A rule is best interpreted as the laws enforced by the courts (whether originated from statutes or …the common law[864]), and the broad sense includes conventions, habits or practices which are not enforced by the courts. Thus, the criterion employed by Dicey in differentiating strict and broad rules is the enforceability of the rules. Jennings said that non-enforceability was just one of the features of conventions, and the political role of conventions should be taken as seriously as the other feature of conventions[865]. In fact, the key justification for the existence of conventions, in the English political context, has been the demand of discretion powers. Although Dicey argued that all powers should be authorized, the real power process includes numerous details, and it is impossible to provide all the links of the exercise of power with the explicit formulations in the constitutional law, especially when government shoulders more and more functions in a welfare state. Against this backdrop, discretion should be conferred to some constitutional subjects by Parliament, and the discretion, originating from the Parliament authorization, should not be seen as a manifestation of arbitrariness. Relations between the rule of law and discretion will be explored later in this section; as will another important constitutional convention, local self-government.

The Diceyan version of the rule of law was developed by some liberalist lawyers. F. Hayek reviewed the ideal of the rule law in *The Road to Serfdom* in 1944, and he said that "government in all actions is bound by rules fixed and announced beforehand, rules which make it possible to foresee with fair certainty how the authority will use the coercive powers in given circumstances,

[862] Jeffrey Jowell & Dawn Oliver, *The Changing Constitution* (seventh edition), (Oxford: Oxford University Press 2011), 14.
[863] William Ivor Jennings, *The Law and the Constitution* (fifth edition), (London: London University Press 1959), 309-311.
[864] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 22-24.
[865] ibid.

and to plan one's individual affairs on the basis of this knowledge[866]". Hayek reaffirmed the basic position of Dicey, that is, a government should not be above the law, and he presented some principles for the rules, including promulgation, certainty of the laws and the predictability of legal consequence. Although Hayek was criticized for the formal understanding of the conception of the rule of law,[867] the principles he provided was acknowledged as part of the meanings of the rule of law in modern days. [868]

With the development of a welfare state, more and more significant functions, especially in the management of economic and social affairs, were assumed by government, and this led to the challenge or development in the understanding of the rule of law. There are two representative lawyers, Friedrich Hayek and Harry Jones. Hayek expressed his attitude towards the rule of law in a welfare state in *The Road to Serfdom*, as mentioned in the above paragraph. Hayek followed Dicey in demanding that all citizens must have access to an independent judiciary before which they can challenge the legality of governmental actions;[869] he leaves less room in his discussion of the rule of law for discretionary power in any system of government which qualified as a government of law.[870] Hayek's theory which was encapsulated in what Harlow and Rawlings termed the "red light" theory. The "red light" theory stressed that courts are the primary weapon for the protection of citizens and the control of executive, which gained power in making regulations and adjudicating upon matters affecting the state affairs,[871] echoing some feelings of the political community in England in the period between 1945 and 1975.[872] The approach, presented by Harry Jones, an American jurist, was very influential in the political practice at that

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[866] Friedrich Hayek, *The Road to Serfdom*, (London: Routledge 1944), 54.

[867] Helen Fenwick & Gavin Phillipson, *Text, Cases and Materials on Public Law and Human Rights* (third edition), (London: Routledge 2011), 86-88.

[868] Jeffrey Jowell, Dawn Oliver, & Colm O'Cinneide (edited), *The Changing Constitution* (eighth edition), (Oxford: Oxford University Press 2015), 34-36.

[869] Ian Loveland, *Constitutional law, Administrative law and Human Rights: A Critical Introduction* (Sixth Edition), (Oxford: Oxford University Press 2012*)*, 57.

[870] Ronald Hamowy, 'Freedom and the Rule of Law in F.V. Hayek', *Politico*, Vol. 36, No. 2 (1971), 349-377.

[871] Carol Harlow & Richard Rawlings, *Law and Administration* (third edition), (London: Cambridge University Press 2009), 23.

[872] Ian Loveland, *Constitutional law, Administrative law and Human Rights*, 57.

time. Harry Jones discussed his standpoint in *The rule of Law and the Welfare state* in 1958. According to Jones, a government turns into an instrument for the achievement of purposes beyond the minimum objectives of domestic order and national defense in a welfare state,[873] and this leads to a vast increase in the frequency with which ordinary citizens come into a relationship of direct encounter with the officials representing a certain regulatory authority.[874] The green light theory welcomes the administrative state, and is suspicious of judges, who, as a class, were argued as being hostile to representative democracy and progress.[875] The green light theory influenced the attitude of Parliament in making statutes on discretionary powers, and this gave rise to the questions of ouster clauses, which will be discussed in 4.4.2.3.

Although the Diceyan version of the rule of law was challenged, the three basic meanings were not abandoned. With the development of English society, the notions presented by Dicey were substantiated by underlying values recognized by lawyers, including legality, certainty, consistency, accountability, due process and access to justice.[876] The rule of law was recognized by the Constitutional Reform Act 2005 as an "existing constitutional principle[877]", and the then Lord Chancellors would take an oath to respect the rule of law and defend the independence of the judiciary.[878] The influence of the term "rule of law" is not limited to the England or the UK, and it seems to have become an important principle worldwide. On the one hand, since 1945, constant efforts have been made to further this constitutional principle in international relations and to secure respect for human rights;[879] for instance, the European Convention on Human Rights promotes the idea that European countries have a common heritage of political traditions,

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[873] Harry W. Jones, 'The Rule of Law and the Welfare State', *Columbia Law Review*, Vol. 58, No. 2 (1958), 143-156.
[874] ibid.
[875] Michael Taggart, 'Reinvented Government, Traffic Lights, and the Convergence of Public Law and Private Law, Review of Harlow and Rawlings: Law and Administration', *Public Law, 1999,* 124-125.
[876] Jeffrey Jowell & Dawn Oliver, *The Changing Constitution* (Seventh Edition), (Oxford: Oxford University Press 2011), 17-22.
[877] See the section 1 of the Constitutional Reform Act 2005.
[878] See the section 17 of the Constitutional Reform Act 2005.
[879] A.W. Bradley, K.D. Ewing & C. J. S. Knight, *Constitutional and Administrative Law* (sixteenth edition), (London, Pearson 2014), 86.

ideals, freedom and the rule of law.[880] On the other hand, differing concepts of the rule of law are put forward as a shorthand description of the positive aspects of any given political system.[881]In this sense, the term "the rule of law" may become a slogan which bears little or no relation to the one it originally described.[882] For instance, the Chinese have developed the socialist rule of law (discussed in chapter 2), which is said, by the CCP and a majority of Chinese scholars, to be the rule of law with the Chinese characteristics. The rule of law in the English context and the so-called socialist rule of law in the Chinese context, provide an opportunity for constitutional comparisons between the two countries, and the illustration of the operation of the Chinese power mechanisms, which will be made in chapter 5.

In practice, the rule of law, as an important constitutional principle, has played a positive role in the restriction of powers in local government. As discussed in the above section, since the modernization of local authorities between 1830s and 1890s, local government in England enjoys a status of corporation, and this may imply two things in terms of the exercise of governmental power in the light of the Diceyan version of the rule of law:

> (1) Local authorities are established by Parliament statutes, rather than royal warrant, which provides governmental actions a legitimate foundation, rather than whim or arbitrariness. In terms of local government finance, local tax, from rates via community charge to council tax, is levied on the authorization of Parliamentary statutes, and central grants are also appropriated on a legal basis. In this sense, the rule of law facilitates the formation of the Statutory Taxation Principle, comprising "statutory, certain, simple, easy to collect and to calculate, properly targeted, constant, subject to proper consultation, regularly reviewed, fair and reasonable, competitive.[883]" Although the introduction of block grant gives local government some discretionary power to decide the allocation of financial resources, the exercise of discretion is circumscribed

[880] See Convention for the Protection of Human Rights and Fundamental Freedoms in European conventions on human Rights, *Rome*, 4, XI, 1950.
[881] Joseph Raz, *The Rule of Law and its Virtue*, from Joseph Raz, *The Authority of Law: Essays on Law and Morality*, (Oxford: Oxford University Press 1979), 210.
[882] Ibid, 195.
[883] Principles of Tax Policy (Eighth Report of Session 2010-11), HC 753, 5.

by the rule of law, like the fiduciary duty doctrine (will discuss in the following section).

(2) The mechanism of judicial review is of constitutional importance in determining the lawfulness of acts or decisions or orders [884] by councils, which provides a legal forum to challenge the lawfulness of the exercise of power. Parliament can amend laws with no restrictions in the light of the Parliamentary Sovereignty, and this may lead to the abolition of local authorities, such as the Great London Council, and the exclusion of judicial review on some governmental decisions, such as the introduction of the ouster clauses. However, the above extreme cases, like the Great London Council and the ouster clauses, do not stand for or change the nature of the judicial mechanism, and the judges may safeguard the position of the courts through the common law system. For instance, in defending the green light theory, the judge held that judicial review "is never to be taken away by any statute except by the most clear and explicit words…[885]".

The limitations of judicial review, including the political question doctrine and the passive nature of the mechanism, may weaken the role of the judicial review as an accountability mechanism, but the positive role of the mechanism in challenging local government power and in protecting human right, especially after the enactment of Human Rights Act 1998, should not be neglected. Besides, the independence of judiciary should not be avoided in discussing the significance of judicial review, and the English courts saw an evolving process in this field, which will be discussed in details in 4.4.3.

4.4.2.2 The Rule of Law and Discretion.

As discussed in the above section, the constitutional principle of the rule of law, should not exclude discretionary power, for on the one hand, it is impossible to list all the details of the power process in laws, on the other hand, discretion is actually exercised within a framework stemming from the spirit of the rule of law in Diceyan version, rather than on the whims of execution. This section mainly discusses the fiduciary duty doctrine as a guideline of the exercise

[884] De Smith, Lord Wood, & Jeffrey Jowell, *Judicial Review of Administration* (sixth edition), (Hebden Bridge: Sweet & Maxwell 2007), 236-240.
[885] [1957] CA, 1 QBP 574.

of discretion; at the same time, a constitutional convention, local self-government, is to be touched upon.

4.4.2.2.1 The Fiduciary Duty Doctrine.

In exercising discretionary power, councils should be subject to the fiduciary duty doctrine, which was developed from the rationale of the law of trustees. The emergence of this doctrine was designed to tackle extreme political problems in which, for example appointed power holders attempt to sabotage a Parliament Act, and to undermine the significance of the newly created local electoral process[886]. To be specific, before the enactment of the Municipal Corporations Act 1835, office holders of some boroughs disposed of the corporation property to themselves with an intention that the newly enfranchised officers would be prevented from operating the assets. After the implementation of the Municipal Corporations Act 1835, elected bodies began to seek the restoration of corporation properties, which were in the hand of the former officers or their nominees, and this gave rise to judicial proceedings. *Attorney General v Aspinall* [887]was the first one amongst such cases, and the judge invoked the theory of "fiduciary duty" in the analysis of *Aspinall*-----officers in local government should hold the properties of corporations on a basis of a trust for local residents.

> *" … a clear trust was created by this Act for public, and …charitable purposes of all the property belonging to the corporation at the time of the passing of this Act; and that the corporation… were in the situation of trustees for these purposes…and subject to the general obligations and duties of persons in whom such property is vested."*[888]

The "fiduciary duty" doctrine was re-interpreted in *Roberts v Hopwood*[889]. The position stated in

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[886] Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (fifth edition), (Oxford: Oxford University Press 2009), 314.

[887] 40 ER 773.

[888] 40 ER 773 at 777.

[889] [1925] AC 578.

Aspinall, was that local authorities were not there to serve as the re-allocators of social resources in accordance with the tastes of their electors, local authorities should be treated as businesses, taking up responsibilities of profits and loses of the operation of public money. Details of *Hopwood* are as follows. Poplar council decided to pay a flat rate wage to its employees, male or female, against the sharp fall of living cost. The legal foundation of this decision was a provision in the Metropolis Management Act 1855, which authorized local government to determine the wages of its employees as it saw appropriate. Based on the Act, Poplar may have thought that restrictions were not imposed on the discretionary levels of the employees' wages. At the same time, a principle which was established in *Kruse v Johnson*[890], stated that decisions of local government should be benevolently interpreted, and this may have given Poplar an assumption that its decision about employees' wages would be interpreted according to the benevolent interpretation principle set up in *Kruse*. However, the district auditors did not agree to the levels of remuneration in the accounts and held that[891]:

> (1) A council, as a fiduciary body, cannot expend public money in excess of those which were needed to obtain the services required;
>
> (2) Wages offered by Poplar council, which was still in a higher level than the living cost, were an unnecessary and unreasonable charges on ratepayers.

Some councilors were surcharged by the district auditors, and they applied to judicial redress. The House of Lords, said, in the verdict, that the exercise of power in providing flat-rate wage to employees, should be fettered with the fiduciary duty doctrine; in *Aspinall* and some analogous cases, the role of local government in redistributing social resource to gain support of the local electorate, was neglect or undervalued.[892] The position of the court in *Hopwood* was criticized by some scholars, and the standard for the reasonable exercise of discretion, provided by the

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[890] [1898] 2 QB 91.

[891] Harold J. Laski, 'Judicial Review of Social policy in England: A Study of Roberts v. Hopwood et al.' *Harvard Law Review*, Vol.39, No. 7 (1926), 832-848.

[892] [1925] AC 578.

Lords, was re-interpreted in *Wednesbury* (discussed in 4.2.2), and the implication of substantive reasonableness was expansively interpreted through "*Wednesbury unreasonableness*". In *Wednesbury,* the court reiterated that judicial authorities had been entitled to interfere the power process of local authorities by investigating whether or not it had taken into account what it ought not to have taken into account, or had failed to take into account what it ought to have taken into account (see 4.2.2); the policy of councils should not be legally recognized as unreasonableness when one of the reasonable persons regarded it to be consistent with the powers authorized by Parliamentary laws. As mentioned earlier in this paragraph, the reasonableness of a bye-law, enacted by a local council, was challenged in *Kruse*, and the court held that policies formulated by local authorities should be "benevolently" interpreted; and unreasonableness indicated a decision or policy which was manifestly unjust, or contained elements of bad faith or fraud, or involved gratuitous and oppressive interference with citizens' rights.[893] The expanded interpretation of *reasonableness* through formulating *unreasonableness* in *Wednesbury*, demonstrated, on the one hand, legal self-restraint, on the other hand, the weak place of the judicial branch in the power structure. In the restriction of the exercise of discretionary power in local government through the historical process, one point has been made clear and that is how the exercise of power is interpreted by the courts through judicial procedure, although there are limitations to the full participation of the judiciary in curbing executive powers.

4.4.2.2.2 Constitutional Convention.

The constitutional convention, or constitutional morality, also provides underlying principles for discretion in the English context, and an important convention, local self-government, will be explored in this section. Constitutional conventions arise from what Professor Turpin calls "the hardening of usage" over a period of time,[894] and the exercise of powers in England, in a sense,

[893] [1898] 2 QB 91 at 99.

[894] Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis*, (Oxford: Hart Publishing 2012), 36.

is still said to be "everywhere penetrated, transformed and given efficacy[895]" by them.

Local authorities in England had once been considered to be an "ethical commitment to an extremely vague notion of local self-government[896]", and "self-sufficient[897]"was invoked to portray the general scenery of local finance which, stood for the essence of local self-government for a relatively long period before the industrial revolution. The connection between financial autonomy and political self-government has legal implications, and representative democracy carries with it the power to raise sufficient money to carry out the policies approved by the electors.[898] Two meanings are argued to be inherent in the concept of local self-government: (i) a local community should be entitled to make decisions on issues falling within its remit,[899] and this means local government, and as a layer of *government*, it should enjoy a political autonomy, and should not be treated merely as an extension of central government; (2) local government should be entitled to elect the governing bodies e.g. local council or mayor, [900]and this means local government should enjoy a local democracy in the determination of local issues.

The tradition of local self-government in England, could be traced back to the early medieval period, when some local communities were granted certain rights and privileges by the Crown and enjoyed a degree of political autonomy, particularly from the interference of royal officials,[901] and made, in exchange, financial contributions to the royal exchequer.[902]At that time, there was no democratic element in local self-government, for the charters were always granted

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[895] Sir Ivor Jennings, *The Law and the Constitution* (fifth edition), (London: University of London Press 1959), 81 and 113.

[896] W.J.M Mackenzie, *Theories of Local Government*, (London: The London School of Economics and Political Science 1961), 7.

[897] Martin Loughlin, *Legality and Locality,* 105.

[898] Ian Leign, Law, *Politics and Local Democracy*, 100.

[899] Carlo Panara, *The Contribution of Local Self-Government to Constitutionalism in the Member States in the EU Multi-Layered System of Governance*, See Carlo Panara and Michael Varney (edited), *Local Government in Europe: The "Fourth Level" in the EU multi-layered System of Governance*, (London: Routledge 2014), 372.

[900] Ian Leign, Law, *Politics and Local Democracy*, 100.

[901] S. H. Bailey, *Cross on Principles of Local Government Law (third Edition)*, quoted from Carlo Panara and Michael Varney (edited), *Local Government in Europe: The "Fourth Level" in the EU multi-layered System of Governance*, (London: Routledge 2014), 340-341.

[902] ibid

individually and haphazardly by the Crown.[903] With the modernization of local government, the democratic factor influenced the development of local self-government, and Parliament intervened in this tradition through its legislative work. As discussed in the vicissitudes of local finance in 4.2, the Municipal Corporation Act 1835 provided an electoral foundation for local authorities; the local Government Act 1888 introduced county councils in some rural areas; and the Local Government Act 1894 pushed the structural reform of local government to the urban and rural district councils. Meantime, in the light of the Local Government Act of 1972, some local authorities converted into "unitary authorities", this means that there is only one level of elected body to deliver services to exercise powers granted by Parliament. The Local Government Act 2000 created the potential for the adoption of directly elected mayors[904] outside London, and the democratic element seemed to be strengthened; although only a handful of local authorities have chosen to have directly elected mayor. The Localism Act 2011 was designed to enhance the development of political autonomy through the introduction of the general power of competence, and the diversity of the provision of public services.[905] England is a state of the United Kingdom, which is undergoing a process of devolution through the enactment of the Northern Ireland Act 1998, the Government of Wales Act 2006, and the Scotland Act 1998. According to the devolution Acts, Wales, Scotland, and Northern Ireland now have distinct legislative and executive institutions separate from central government.[906] This enables decisions to be made in the devolved areas that are responsive to local opinion, a situation that may not have been possible under a centralized system.[907] The devolution process, introduced subsidiarity into the constitutional arrangements in the UK,[908] and European Charter of Local Self-Government 1985

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[903] Michael Varney, *Local Government in England: Localism Delivered?* In Carlo Panara and Michael Varney (edited), *Local Government in Europe: The "Fourth Level" in the EU multi-layered System of Governance*, (London: Routledge 2014), 341.

[904] ibid, 343.

[905] Open Public Services White Paper, The Stationery office, (2011) Cm 8145.

[906] David Feldman QC, FBA & Andrew Burrows QC, FBA (edited), *English Public Law* (second edition), (London: Oxford University Press 2009), 9.

[907] Dawn Oliver, *Constitutional Reform in the United Kingdom*, 293.

[908] ibid

was ratified in 1998. Regional devolution in England may be promoted against the backdrop of the UK devolution and the "European influence[909]".

Overall, the convention of local self-government provides local authorities a principle for the exercise of discretion, that is, local electorates should play a role in determining how to exercise discretionary power. Although the extent to which local self-government has been realized in the power process should not be overestimated, there are some positive changes in the evolution of the convention.

4.4.2.3 The Rule of Law and the Parliamentary Sovereignty.

According to Dicey, all power should be authorized by Parliamentary, and the courts take charge of reviewing whether or not powers are wielded in line with Parliament laws. Thus, the Diceyan version of the rule of law seems to stress the subservience of the courts to the Parliament, with the sovereignty of Parliament seemingly being more fundamental. In fact, relations between the rule of law and the sovereignty of Parliament, are much more complicated. In the first place, the courts have the authority to interpret laws[910], and this may leads to extreme judicial deference to the decision-making of the executive branch,[911] just as *liversidge vs Anderson*[912] has revealed. This situation has been improved. According to the Human Right Act 1998, the courts are required to interpret the primary and subordinate legislation in a way, compatible with the European Convention of Human Rights; if there is contradiction between Parliament laws and the European Convention of Human Rights, the courts have power to set aside, rather than strike down Parliament laws through the implied repeal.[913] On the other hand, Parliament could

[909]Colin Crawford, 'European Influence on Local Self-Government?' *Local Government Studies*, 18 .01(1992) 69-85.
[910] Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights,* 76.
[911] Carleton Allen, *Law and Orders*, (New Delhi: Universal Law Publishing Co. Ltd. 2004), 242-251.
[912] [1942] A.C. 206.
[913] See the section 3 of the Human Rights Act 1998.

theoretically enact any law on its own will.[914] Here, the ouster clauses (mentioned in 4.3.5), which were enacted to marginalize the judicial review of the exercise of public powers,[915] may be discussed as another example. An ouster clause refers to a provision of legislation, which is intended to prevent the courts from considering a specified question or from reviewing a specified decision or act[916]. There was once a period in 1950s and 1960s, when Parliament acted to substantially cut out the power of judicial review in common law by presenting alternative approaches for review, appeal, or inquiry[917]; the theoretical context for those ouster clauses is the "green light" theory, advocated by an America jurist Harry Jones. According to the theory, restrictions on governmental discretion should be loosened, so as to promote the collective well-being of a society.[918] For instance, section 36 (3) of the National Insurance Act 1948 declared that the tribunal's decision shall be final, and this might prevent individuals from seeking judicial review of the decisions by the tribunal. In *R v Medical Appeal Tribunal, ex p Gilmore*[919], the judge held that judicial review "is never to be taken away by any statute except by the most clear and explicit words; the final word, which means without appeal, is not enough…[920]". Another example is the section 4 (4) of the Foreign Compensation Act 1950, which insisted that decisions of a Commission, which was set up to distribute limited funds among British nationals whose overseas property had been seized by foreign governments[921], "shall not be called in question in any court of law[922]". In *Anisminic Ltd v Foreign Compensation Commission*[923], the court exercised judicial review by insisting that the commission made an error in the process of

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914 Quoted from a lecture by Professor Vernon Bogdanor, *The Human Rights Act: Cornerstone of a New Constitution*, in the Gresham College on 25 January 2005. The video of the lecture can be available at http://www.gresham.ac.uk/lectures-and-events/the-human-rights-act-cornerstone-of-a-new-constitution.

915 Michael Fordham, 'Judicial Review, the Future', *Judicial Review*, 13.01(2008), 66-68.

916 Daniel Greenberg, Ouster Clauses (online), an Insight from Westlaw http://login.westlaw.co.uk/maf/wluk/app/document?&srguid=i0ad82d0800000150244bca00b5aac300&docguid=I45AFD0807D0711E3AD11C27617014303&hitguid=I45AFD0807D0711E3AD11C27617014303&rank=1&spos=1&epos=1&td=68&crumb-action (accessed on 28-10-2015).

917 Ian Loveland, *Constitutional Law,* 76.

918 Ibid, 59.

919 [1957] 1 QB 574.

920 ibid

921 Ian Loveland, *Constitutional Law,* 77.

922 See the section 4 (4) of the Foreign Compensation Act 1950.

923 [1969] 2 AC 147.

decision-making, rather than declaring directly the unlawfulness of the Commission's decision. As a member of the European Union, and with the introduction of the Human Rights Act 1998, England is said to have seen a "decline of Parliament"[924], and relevant points, including the "implied repeal" of the Parliament laws, the compatibility of the domestic law with the European Union law, the concurrent posts of the administrative and the legislative bodies, and the constitution reform, have discussed in 4.3.5, 4.4.2.1, and will be further discussed in 4.4.3.

Here, the independence of the judiciary, which is said to be an important part of the rule of law, as an important principle in constitutional law (see 4.4.2.1), should be discussed, against the supreme power enjoyed by the Parliament. Based on the Diceyan version of the rule of law, the courts serve as an important part of the rule of law, and the independence courts, in the English context, is achieved through a historical process, rather than being unchangeable. First, English judges were subject to the King's pleasure for a time before the 1688 revolution or immediately thereafter. The King determined the appointment of judges, and could dismiss those who displeased the supreme authority; and this might lead to the potential subversion of the Parliamentary sovereignty, since the King could have "persuaded" judges to interpret laws in a manner inconsistent with the intention of the Parliament through the authority of dismissal[925]. As a result, the court had to be under the thumb of the King. The Act of Settlement of 1701 began to change the situation. According to the Act, judges appointed by the Crown, with no breach of a good behaviour, would not be removed simply at the whim of the King[926]. Even if a judge committed a crime or behaved against the gross form of moral concepts, it was the joint address of the Houses of Parliament that were required to dismiss the judge in question. The judgement of *Entick v Carrington (1765)* [927]clearly showed that the court is not absolutely independent of the Parliament, since Parliament retains the power of dismissing judges. This means that the

[924] Vernon Bogdanor, *The New British Constitution*, (Oxford: Hart Publishing 2009), 15.
[925] Ian Loveland, *Constitutional Law, a Critical Introduction (*second edition), (London: Lexisnexis Butterworths 2000), 51.
[926] Robert Stevens, *The English Judges, Their Role in the Changing Constitution*, (Oxford: Hart Publishing 2002), 9.
[927] 95 ER 807.

Parliament might theoretically control the constitution of the judicial branch by changing the balance of the judges, and the change may be legally achieved in a formal sense. Although Parliament scarcely ever dismissed judges in England, the possibility was said to be existed in theory and once become reality in the aftermath of *Harris v Minister of the Interior* in South Africa.[928] There were also functional and personnel overlap between the judicial and administrative branches, as well as between the judicial and legislative branches. This point will be discussed in 4.4.3. Besides, the courts were given a new role in the combined effect of the Human Right Act 1998, devolution, and the development of EU, and senior judges are required to police constitutional boundaries and determine sensitive human rights issues in a way which would have been unthinkable forty years ago.[929]

Overall, the independence of the judiciary evolved over a very long period of time in England, and the evolutionary process does not stop even at the present time. So, it is too early to evaluate recent developments in this area, but this evolution speaks to the significance of an independent judiciary in terms of judicial review as an accountability mechanism, and the feasibility of gradual changes of political system in a country. The independent judiciary is a subject to return to in the following section concerning the separation of powers. The judicial accountability mechanism is an important point in terms of forthcoming comparisons in chapter 5, and the evolutional process of the judicial branch may provide a useful train of thought when alternative approach to Chinese issues are discussed in chapter 6.

4.4.3 The Separation of Powers.

Generally speaking, the origin of the doctrine of the separation of powers could be traced back

[928] Ian Loveland, *Constitutional Law, a Critical Introduction*, 51.

[929] K. Malleson, *The Effect of the Constitutional Reform Act 2005 on the Relationship between the Judiciary, the Executive, and Parliament*, Appendix 3, Sixth Report of the Select Committee on the Constitution, 2006-2007; quoted from Helen Fenwick & Gavin Phillipson, *Text, Cases and Materials on Public Law and Human Rights* (third edition), (London: Routledge 2011), 143.

to the belief in "mixed government" in ancient Greece and Rome, and the English discussed this doctrine in the mid-seventeenth century as an approach to the abuse of powers, referring to the separation of legislative and executive powers at that time.[930] The separation of powers was theoretically developed by John Locke in the *Second treatise of Civil Government*, but he did not mention the independence of judicial power in his writing[931]. Montesquieu, a French lawyer, gave the theory a more systematic consideration in *The Spirit of the Laws*. According to Montesquieu, public powers were divided into the legislative, administrative and judicial branches, responsible respectively for the law-making, the execution of the public resolutions, and the judgement of civil causes and crimes; and each of the functions should be in the exercise of different persons. The independence of the judicial branch was particularly stressed by Montesquieu, and the judiciary should not be identified with any one estate or class of persons in the state.[932] The power model of Montesquieu is not watertight; at least, the question of the appointed judges responsible for the supervision of decisions by the representative body, is unsettled. However, the positive aspect of the tripartite model in the checks and balances of powers, could not be denied. For instance, the separation of legislative power and executive power may result in the maintenance of the rule of law, and the safeguard of liberty[933], since the concurrent post of legislature and administration may produce the redefinition of laws, based on the caprice, in the implementation of relevant laws[934].

In the English context, the doctrine of the separation of powers may be the most contestable principle in the constitutional law, some lawyers even question whether it is a political ideal, or a legal principle.[935] There is separation of powers at first glance, that is, the three branches, which

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930 Colin Turpin & Adam Tomkins, *British Government and the Constitution,* 107.

931 Alexander Tuckness, *Locke's Political Philosophy*, in Edward N. Zalta (edited), *The Stanford Encyclopaedia of Philosophy* (2012 edition), http://plato.stanford.edu/archives/win2012/entries/locke-political

932 George Rossman, 'The Spirit of Laws: the Doctrine of Separation of Powers', *American Bar Association Journal*, Vol.35, February (1949), 93-96.

933 Gavin Drewry, *The Executive: Towards Accountable Government and Effective Governance*, in Jeffrey Jowell & Dawn Oliver (edited,)*The Changing Constitution* (seventh edition), (Oxford: Oxford University press 2011), 190.

934 ibid

935 George Rossman, *The Spirit of Laws*, 93-96.

wield public powers-----Parliament, the Executive and the Courts, have distinct and largely exclusive power space. To be specific, "Parliament has a legally unchallengeable right to make whatever laws it thinks right; the Executive carries on the administration of the country in accordance with the powers conferred on it by law; the Courts interpret the laws, and see that they are obeyed.[936]" However, the substance of the power arrangement looks more like balancing and checking of powers, rather than a formal separation of the tripartite branches, which is called by Walter Bagehot in *The English Constitution*, the nearly complete fusion of the executive and legislative powers.[937]

According to Bagehot, the importance of the constitutional arrangement in England consisted of the entire separation of the legislative and executive authorities, but in truth its merit consisted in their singular approximation.[938] The connecting link between the "entire separation of the legislative and executive authorities" and "their singular approximation", rests with the cabinet, a committee of the legislative body selected to be the executive body.[939] Bagehot's argument may indicate the overlapping of public bodies both in the functional dimension and personnel dimension, which did not see substantial changes until the introduction of the Constitutional Reform Act 2005. The functional overlapping within the legislative, executive and judicial branches was outlined by Vile in 1967 as "rules are made by civil servants and by judges as well as by legislatures; rules are applied by the courts as well as by the executive; and the judgements are made by civil servants and ministers as well as by judges.[940]" In fact, both the delegated legislation and the administrative adjudication, were questioned, as early as the 1930s, by the Donoughmore Committee, and the practice of the delegated legislation was regarded as being a denial of the separation of powers, threatening the Parliamentary Sovereignty and the rule of

[936] *R v Secretary for the Home Department Ex p. Fire Brigades Union* [1995] 1 A.C. 513, 567.
[937] Walter Bagehot, *The English Constitution*, (London: Colins 1963), 65.
[938] ibid, 65-66.
[939] Walter Bagehot, *The English Constitution*, 66.
[940] M.J.C. Vile, *Constitutionalism and the Separation of Powers (Second Edition)*, (Oxford: Clarendon Press 1967), 307.

law.[941] At present time, Vile's description does not become a totally outdated pattern, but there are truly some changes in this field.

In terms of overlapping in functional dimension, (1) Delegated legislation, dependent upon ministers who make rules under the Parliament act, is said to have practically taken over the function of the Parliament;[942] while the judicial function of the executive seems to strengthen the separation of powers, especially under the influence of the European Convention of Human Rights, and a famous instance is related to a tariff for the sentence of juvenile killers by the Home Secretary.[943] (2) Although the nature of the common law system, which allows the judges both to decide individual cases, and to develop (or even change) the law more generally,[944] does not see fundamental changes. The Human Rights Act 1998 does bring some fresh elements to the relations between the legislature and the judiciary. According to the section 3 of the Act, "primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights[945]", and this gives rise to an interpretative obligation being placed on judges to ensure the compatibility of enactments, both previous and subsequent, with the Convention rights.[946] The courts can make a declaration of incompatibility in the light of the section 4 of the Act, when they are satisfied that the provision is incompatible with a convention right.[947] The most well know and far-reaching declaration so far, was made by the House of Lords in *A v Secretary of State for the Home Department*,[948] and the declaration was accepted, with the offending provisions in the Anti-Terrorism, Crime and Security Act 2001 was repealed.[949] It should be noted that the courts can declare *incompatibility*, but cannot *over throw* an act of

[941] Report of the Committee on Ministers' Powers (Donoughmore Committee), Cmd 4060, (1932), 4-5.
[942] Helen Fenwick & Gavin Phillipson, *Text, Cases and Materials on Public Law and Human Rights (*third edition), (London: Routledge 2011), 133.
[943] ibid, 137.
[944] Helen Fenwick & Gavin Phillipson, *Text, Cases and Materials on Public Law*, 141.
[945] See the section 3 of the Human Rights Act 1998.
[946] See the section 4 of the Human Rights Act 1998.
[947] ibid
[948] [2004] QB 325.
[949] Helen Fenwick & Gavin Phillipson, *Text, Cases and Materials on Public Law*, 970.

Parliament; this means that the declaration of incompatibility is a kind implied repeal (this point has been discussed in 4.3.5).

In terms of the personnel overlapping, (i) the Cabinet, the most important body of the executive, is made up almost entirely of Members of Parliament, the legislative body;[950] (ii) before the Constitutional Reform Act 2005, the Lord Chancellor was both a senior Cabinet minister and head of the judiciary at the same time;[951] he was responsible for the judiciary, and determined their pay and pensions.[952] (iii) The Appellate Committee of the House of Lords, was the highest court (the Judicial Committee of the Privy Council was responsible first for overseas appellate cases and then the cases related to devolution issues).[953] Historically speaking, the appellate function was limited to the House of Lords after the case of *Thomas Skinner v. East India Company*[954] in 1670s. Under the Great Reform Act 1832, the Judicial Committee of the Privy Council was set up to take over the overseas appellate role. In the historical process, rules were established to carry out this function effectively. The first measure was the rota system of lay Members of the House in hearing relevant cases, and in 1844, a basic convention that lay members should be excluded from voting appellate cases took shape in *O'Connell v. The queen*[955]. Following that, a professional panel consisting of judges from lower courts saw the early formation in the Appellate Jurisdiction Act 1876, and the judges were appointed as the Lords of Appellate in Ordinary (Law Lords in colloquial style) in the light of the Act. The Appellate Committee was established in 1948, and the reasons included the change of the working place for the House due to the Second World War. Here, it should be noted that although the Law Lords

[950] ibid, 133.
[951] A.W. Bradley, K.D. Ewing & C.J.S. Knight, *Constitutional and Administrative Law* (sixteenth edition), (London: Pearson 2014), 93.
[952] Robert Hazell, 'Judicial Independence and Accountability in the UK have both emerged Stronger as a Result of the Constitutional Reform Act 2005', *Public Law*, Apr. (2015), 198-206.
[953] Colin Turpin & Adam Tomkins, *British Government and the Constitution*, 107.
[954] (1660) St. Tr.710.
[955] (1844) 11 Cl. & Fin. 155.

heard relevant appeals, that it was the House of Lords that considered the appeals formally, and this was a convention as well[956].

Theoretically, the Law Lords were appointed on a Writ of Summons, which had the same terms as that issued to all other Peers at the commencement of every Parliament, and they were entitled to participate in the legislative process in the same way as other peers in the House of Lords. This has given rise to the phenomena that seniors members of the judiciary also sat in the legislature. In the Chapter 11 of *The Judicial House of Lords 1876-2009*, Lord Hope, analysed what the Law Lords had contributed to the legislative business by reviewing different approaches of the participation from a historical standpoint. In his Chapter, Lord Hope reiterated two principles employed by the Law Lords when participating in debates and votes in the House[957]: first, they do not think it appropriate to engage in matters with a strong element of party political controversy; and secondly they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal to the House. The two principles may help to explain that although there was overlapping between the judicial and legislative function and personnel in the House, there is potential for bias to be avoided in the legislative business especially when Law Lords work as part of the legislators.

Under the Constitutional Reform Act of 2005, a separate Supreme Court was established in 2009, which took over the appellate function by the Appellate Committee of the House of Lords and the devolution jurisdiction of the Judicial Committee of the Privy Council. According to the part 3 of the Constitutional Reform Act 2005, the 12 judges who constitute the Supreme Court, are the former 12 Lords of Appeal in Ordinary in office, who are now disqualified from sitting and voting in the House of Lords as long as they remain Justices of the Supreme Court, and are also disqualified from the Commons. The Act replaced the Lord Chancellor as head of the judiciary

[956] The Lord Chancellor were required to take his place at the beginning of each day's sitting.

[957] David Hope, *Law Lords in Parliament*, in Louis Bolm-Cooper, Brice Dickson, & Gavin Drewry (edited), *The Judicial House of Lords 1876-2009*, (Oxford: Oxford University Press 2011), 176.

by the Lord Chief Justice, and established the Judicial Appointments Commission. [958] Currently, the future profile of the new Supreme Court is not clear, and it is too early to evaluate the operational effect of the Supreme Court. Opinions are divided in terms of whether relevant changes are of form or substance in the press and legal circles. Some scholars argue that the reforms may have a positive influence on the judicial independence and accountability in the UK;[959] the separation of powers as between the executive and the judiciary, on the one hand, and the legislature and judiciary, on the other hand, has been greatly strengthened, which implies an improvement of the judicial independence, anchored on the rule of law.[960] However, others hold that relevant reforms are of form, and the reasons included: (i) the justices of the new Supreme Court are the former 12 Lords of Appeal in Ordinary in office;[961] (ii) the new Supreme Court takes over the appellate functions which shared by the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council, and its judges are not given new powers which were not exercised by the Law Lords, with the exception of being able to rule on devolution issues.[962] Of course, it is too early to evaluate relevant reforms, but an independent judiciary may see some indication from the fact that the judges are disqualified from sitting and voting in the House of Lords as long as they remain Justices of the Supreme Court, and are also disqualified from the Commons.[963]

Each branch of government, in the English context, has a legitimate role in checking the activities of the others.

> (1) The Parliament checks the Executive through the constitutional conventions, like the individual ministerial responsibility, and through some

[958] A.W. Bradley, K.D. Ewing & C.J.S. Knight, *Constitutional and Administrative Law*, 93.
[959] ibid
[960] Lord Styen, 'Democracy, the Rule of Law and the Role of the Judges', *European Human Rights Law Review*, No.3 (2006), 243.
[961] See the section 23, 24 of the Constitutional Reform Act 2005.
[962] Glenn Dymond, 'The Appellate Jurisdiction of the House of Lords' (online), http://www.parliament.uk/documents/lords-library/lln2009-010appellate.pdf (accessed on 19-11-2015).
[963] ibid

practical measures, including Parliament questions, debates, motions and Select Committees. [964] The focus of this thesis is the accountability mechanisms in local government, and how Parliament checks the central government is mentioned in passing, but it should be noted that these kind of checks between different branches of powers provide an overall background of the constitutional arrangements in the UK. Parliament is responsible for scrutinizing and approving secondary legislation, and this is also an opportunity to check the executive legally.[965]

(2) In terms of the judiciary, the role of checking the Executive is reflected in the system of judicial review. On the one hand, there are areas which cannot be checked by the courts, as noted in *Council for Civil Service Unions v the minister for the Civil Service*[966], that is, the making of treaties, the disposal of the armed forces, the defense of the realm, the dissolution of Parliament…and the appointment of Ministers.[967] On the other hand, with the enactment of the Human Rights Act 1998, the courts are enjoying a relatively new power in checking the Executive. Implied repeal of provisions in delegated legislation which are incompatible with one or more of the Convention rights; [968] in other words, the courts are able to quash the decisions of public bodies not because they were outside their powers, or did not follow a fair procedure, but on the substantive basis that they violated human rights.[969] Meantime, as a member of the European Union, domestic law of the UK cannot contradict EU law, otherwise the courts would not adopt the national law.[970]

(3) As for the judicial checks on Parliament, the role of the courts were traditionally limited, this means that the courts were responsible for the application of statutes agreed by Parliament. Under the influence of the European Union and the Human Rights Act 1998, the courts have been

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[964] Brice Dickson, 'Safe in their Hands? Britain's Law Lords and Human Rights', *Legal Studies*, Vol. 26, No. 3(2006), 329-346.

[965] Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention', *Legal studies*, 22.03(2002), 340-376.

[966] [1984] 3 All ER 935.

[967] Mark Elliott, *Parliamentary Sovereignty and the New Constitutional Order*, 340-376.

[968] See the section 6 of the Human Rights Act 1998.

[969] Dan Squires, 'Challenging Subordinate Legislation under Human Rights Act, European Human Rights Law Review', No. 2 (2000), 116-130.

[970] Joseph Raz, *The Rule of Law and Its Virtues*, 566.

conferred with an important role of scrutinizing the compatibility of the statutes with the Convention rights and the EU Law, as discussed in the point (2).

The essence of the separation of powers, as Barendt says in 1995, rests with the prevention of the arbitrary actions of government, or the tyranny, which may arise from the concentration of power.[971] The checks of power between different branches may provide limitations, rather than arbitrariness, to the power process, as discussed in the above paragraphs, but they cannot be an adequate approach to fully avoiding the concentration of powers. Although improvements have been made in the separation of powers, especially the independence of the judiciary, the complete realization of the constitutional principle of the separation of powers, still has a way to go in England, for there is still some overlapping in terms of functions and personnel. It should be noted that the separation of powers is a point for the constitutional comparison in chapter 5, for Chinese power is concentrated on the People's Congress in theory, and monopolised by the CCP in practice (discussed in chapter 2); this may be an important perspective to illustrate the failure of the accountability mechanisms in the Chinese local government.

4.5 Conclusion.

Overall, from the 1830s onward, local government finance in England has been undergoing a trend of fiscal centralism, and central government today still largely controls local revenue and expenditure through grant aids and ring-fencing. Meantime, unlike their Chinese counterparts, the dependence of local finance upon the central government does not give rise to the abuse of power since it is operated in a set of accountability mechanisms. Of course, each of the mechanisms has some limitations in discharging its full functions, as discussed in the section 3 of this chapter, but all the mechanisms are workable in making local government accountable. In the process, human rights are not infringed: (i) political participation of citizens may be protected.

[971] Eric Barendt, 'Separation of Powers and Constitutional Government', *Public Law*, No.4 (1995), 599.

Although the electoral mechanism sees a low turnout, measures have been taken to motivate the passion of citizens: the referendum are included and the deliberative democracy has been tabled in agenda. (ii) Social and economic rights, as the second generation of human rights written in *the International Covenant on Economic, Social and Cultural Rights*, may be safeguarded, as one of the inherent values of local government (mentioned in 4.3.7). According to the official website of central government, county councils are responsible for services across the whole of the county, including: education, transport, planning, fire and public safety, social care, libraries, waste management, and trading standards; district, borough and city councils are responsible for services, like rubbish collection, recycling, council tax collections, housing, and planning applications.[972] If human rights are infringed, or likely to be infringed, the local government ombudsman, and judicial review may be resorted to challenge the unlawful acts; local auditors may check the lawfulness of local government annually and actively; opinions may be expressed in local election or referendum about the increase of local tax, etc.

Among the accountability mechanisms, the administrative mechanism through central government seems to be more effective, and this pushes central control over local finance. In terms of the constitutional context, the weak status of local government in the uncodified constitution works as one of the reasons which leads to the predominance of central control. Meantime, the constitutional principles-----the rule of law and the separation of powers, could be treated as the constitutional background of the fiscal centralism in England. Based on the section 4, the rule of law, as a constitutional principle, was first defined by Dicey, who gave the principle three meanings. The Diceyan version of the rule of law did not touch the independence of the judiciary; in fact, an independent judiciary is still one of the targets of the on-going constitutional reform in England even today. Sir Thomas Legg argued, in 2004, that judicial independence required a greater democratic involvement in the appointment of senior judges as a matter of

[972] https://www.gov.uk/understand-how-your-council-works/types-of-council (accessed on 25-10-2015).

principle,[973] but this suggestion and related matters seem to be still open to question today. At the same time, state power in England is organized on a fusion of powers, this may provide some negative impacts on the administrative mechanism and the judicial mechanism. For instance, the Cabinet, the most important body of the Executive, still accounts for a majority of the legislative body, members of Parliament and this means that central government may control the contents of the legislation to ensure its predominant status in local government finance; the weak position of the judicial branch in the power structure may negatively influence the role of judicial review in checking the administrative power. The European Union, the Human Rights Act 1998 and the Constitutional Reform Act 2005, combine to produce some positive influence on the discharge of the functions of judicial mechanism (discussed in 4.4.3), the existing negative influence should not be underestimated in terms of the accountability mechanisms. As a result, this drawback actually weakens the role of judicial review in checking fiscal policies and decisions in local government; in other words, the weak place of the judicial branch seems to indulge the administrative control in local finance.

[973] Sir Thomas Legg, 'Brave New World---The New Supreme Court and Judicial Appointments', *Legal Studies*, 24(/2) (2014), 45-46, 49 & 52.

Chapter 5: Reflective Comparisons between Mainland China and England.

5.1 Introduction.

The aim of this chapter is to make a reflective comparison between China and England, based on the previous exploration of the exercise of fiscal power in local government and the underlying constitutional rationales in the two countries, which were presented in chapters 2, 3 and 4. The comparative reflection is intended to provide some useful perspectives in analysing Chinese issues and in offering an alternative way forward which can help to reconcile some difficult and competing issues related to the exercise of power in local government finance in mainland China.

As discussed in chapter 1, a constitutional comparison is always grounded on similarities and differences in overall constitutional systems or parts of a specific system, within at least two countries, or two legal families[974]. Deciding where to place the emphasis on differences or similarities, or to give attention to both, depends on the purpose of comparisons.[975] The main purpose of this thesis, is to seek helpful guidance for Chinese issues from elsewhere, and in this case the comparator country is England. Based on the similar problem awareness, it is interesting to see how the two countries deal with similar issues, and this will demonstrate the commonality of problems and will also show the contrasting approaches to solving the problems. In this chapter, the problems shared by the two countries and related to the weak fiscal status of local authorities, will be taken as similarities; the similar status of local finance gives rise to different approaches to the exercise of power due to different accountability mechanisms and constitutional rationales, which are explored as differences. Different approaches to similar problems may help to reveal

[974] W.J. Kamba, 'Comparative Law: A Theoretical Framework', *International and Comparative Law Quarterly*, Volume 23, July (1974), 485-519.

[975] Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?* in Mathias Reimann & Reinhard Zimmermann (edited), *The Oxford Handbook of Comparative Law*, (Oxford: Oxford University Press 2006), 383-384.

the causal elements of Chinese issues, and this will facilitate ideas of potential solutions to the arbitrary exercise of power in Chinese local finance.

5.2 Similar problems.

The comparative reflection between mainland China and England commences with the exploration of similarities in respect of local finance in the two countries, because of the desire to search for the commonality of problems. Based on chapters 2, 3 and 4, China and England share some similar problems in local government finance. On the one hand, the 1982 Chinese Constitution provides local government with an ill-defined status (discussed in chapter 2). Against the ambiguity of local government in the Chinese context, functions of local government are vaguely formulated, and this actually leads to the shifting of public expenditure from central government[976]in relation to the existing fiscal system of the revenue-sharing scheme, put into effect in 1994. As discussed in chapters 1 and 2, "revenue-centralizing and expenditure-decentralizing" gives rise to fiscal difficulties in local government and pushes the dependency of local finance on the central government (discussed in chapter 2). On the other hand, the uncodified constitution in England, which went through an evolution of 800 years, provides local authorities with no formal status either (discussed in chapter 4); and the absence of a constitutional position gives rise to the lack of constitutional protection for local government and the frequent changes of local functions (discussed in chapter 4). The insecurity of local government in the constitution law of England produces an unstable fiscal system in local authorities, and is subject to Parliamentary statutes and the whims of central government.

[976] Wu Jiaqi & Li Manlin, 'A Study of Democratic Centralisation and Power Rules for Local Government in China', *Journal of Yunnan Administration College*, No.2 (2000), 34-38.

5.2.1 The Ill-Defined Status of Local Government in Constitutional Law.

5.2.1.1 The Ambiguous Status in Chinese Context.

Historically speaking, during the planned economy era, between the establishment of the PRC in 1949 and the commencement of the socialist market economy in 1992, Chinese local government were merely agencies of central government[977], and they depended on central plans for everything; local government exercised their duties in strict obedience to the "plans" made by the central government, and plans were always made in accordance with the policies of the CCP[978]. Under such circumstances local finance was totally controlled by the central government, and there was no "local revenue" or "local expenditure", only the "fiscal plan" of central government.

The Reform and Opening-Up, a process initiated in the early 1980s, introduced the socialist market economy to mainland China, this freed local government from the restriction of "plans". As a result, local government are required to provide services for the public residing in their jurisdiction, just as a *government* should do[979]. However, Chinese local government, still enjoy an ambiguous status in the 1982 Constitution, and this means that the constitutional status of Chinese local government sees no changes after the establishment of the socialist market economy. There are no specifics about the status of local government in the 1982 Constitution, just a constitutional principle concerning central-local relations which is provided in political discourse: "giving full scope to the creativity, initiative and enthusiasm of local authorities under the unified leadership of central government[980]". In this provision, the political logic in the

[977] Jin Taijun, 'A Study of the Changing Relations of Central-Local Government', *Journal of Yunnan Administration College*, No.3 (1999), 11-15.

[978] Zhang Youcai, 'Economic Policies of the Chinese Communist Party and the Economic Development in Mainland China', *Huxiang Forum*, No.1 (2002), 60-62.

[979] Peng Xianggang & Liang Xuewei, 'To Construct Central-Local Relations in the Provision of Public Service', *Social Science Front*, No. 6 (2006), 194-197.

[980] See the article 3 of the 1982 Chinese Constitution.

Chinese style stresses the "unified leadership" of central government and the attitude expected of local government towards their undertakings in the implementation of local functions---"creativity, initiative and enthusiasm". But there is a gap insofar as there is an absence of instructions on how to safeguard the "creativity, initiative and enthusiasm" of local government in the power framework. At the same time, it is impossible to find a unified criterion for "creativity, initiative and enthusiasm". Therefore, these ideas could be viewed rather as a political tactic which ensures centralization[981] than a legal principle which authorizes governmental power to local authorities.

Under the ambiguous framework of Chinese theory regarding the status of local government, the 1982 Constitution lists the governmental functions which should be assumed by local authorities, and they are almost a reproduction of those of the central government, except for such responsibilities dedicated to the central as diplomacy and national defense (demonstrated in chapter 2). Against the ambiguity, the status of local government and the relatively broad functions they perform, do not represent a stage of local self-government[982], because the division of functions between central and local governments is firmly controlled by the central government. In this sense, functional similarities always lead to the functional evasiveness of local government, and even allowing for the shifting of responsibilities from the central government to local governments; this is a vivid demonstration of revenue-centralizing and the expenditure-decentralizing in local finance, as discussed in the *status quo* of Chinese local finance in chapter 2.

Besides, as discussed in chapter 2, the 1982 Constitution developed a theoretical mechanism of power in local government subject to the system of the People's Congress. It has to be remembered that the administrative leaders of local government, including provincial governors,

[981] Su Li, Reform, 'Rule of Law and Their Local Resources', *Peking University Law Journal*, No. 5 (1995), 3-11.
[982] Wang Mei, 'An analysis on Central-Local Relations since the Establishment of the People's Republic of China', *Journal of Shanxi Normal University (Philosophy and Social Sciences Edition)*, No.2 (1999), 26-29.

mayors, the heads of counties and townships, are all elected by local People's Congress, and the local People's Congress is elected directly or indirectly by Chinese people. Thus, it seems, in theory, that the people ultimately determine the decision-making process in local government, and local government, accordingly, responsible to the people in the exercise of public power. In reality, the CCP controls the process in both central and local governments. As discussed in chapter 3, there exists an organizational structure of the CCP, which is operated in parallel with the governmental structure, and which has been directing Chinese local government of various levels in the name of the party committee system. Therefore the ideal of the bottom-up mechanism in theory has been replaced by the top-down control of the CCP through the political orientation, ideology and the cadre system. In this sense, the theoretical discourse, "the unified leadership of central government" has been transformed into the absolute control of the CCP, and the ambiguity of the constitutional status of local government is always used by the party in realizing its political objectives. Against this backdrop, the performance evaluation mechanism, which is focused on the GDP and gives rise to personnel promotion policies, weakened the status of local government, especially in local finance.

5.2.1.2 Informal Status in English Context.

Similar to Chinese local government, local authorities in England have a doubtful formal status and lack a constitutional safeguard from the gradually evolved constitution, the history of which dates back to 800 years, to Magna Carta, signed by King John in 1215. However, the absence of a formal status in constitutional law does not influence the status of local authorities as municipal corporations in the English context. Municipal corporations are legally created "persons", and are established by Parliamentary statute. This means that local government in England, as the only elected tier of government under the Westminster Parliament, carries out functions in accordance with the authorization of Parliament. For instance, local government saw a series of dynamic transformations in terms of structure and functions after the modernization of local

authorities between 1830s and 1890s, and the transformations were based on Parliamentary statutes, including the Local Government Act 1888, the Local Government Act 1929, the Local Government Act 1972, the Local Government Planning and Land Act 1980, etc. Thus, it may be concluded that local authorities in England have been vulnerable to the whims of Parliament, as in the abolition of the Greater London Council and the metropolitan county councils in the light of the Local Government Act 1985, and this may be partly because of the lack of secure safeguards in constitutional law.

It should be noted that local government in England is operated in the light of a particular vision of the rule of law, and this important constitution principle has been discussed in chapter 4. The essential premise in the rule of law is that government is subject to the law and may exercise its power only in accordance with Parliamentary law[983]. The requirement that public power must be legally justified, an inherent characteristic in the rule of law, was only gradually established through case law, as in, for example *Entick V Carrington.* The principle exponent of the rule of law, A. V. Dicey, was a fanatical supporter of *laissez faire,* and individual freedom was stressed by the Diceyan version of the rule of law[984]. Although Dicey was attacked and criticized by some scholars, the doctrine of individual freedom had never been overturned. Some current views regarding the exercise of governmental power, whether at central or local level, may serve as the arch-enemy of individual freedom[985]; but the rule of law, in its Diceyan sense, may be viewed as safeguarding individual freedoms from the potential attack of the public power. If there is an infringement by central government or other bodies on the functions of local government, or indeed, if some functions of central government were to be usurped by local government the court is the right place where the issue can be resolved in the light of the rule of law. This means

[983] Colin Turpin & Adam Tomkins, *British Government and the Constitution: Text and Materials* (seventh edition), (Cambridge: Cambridge University Press 2012*)*, 98.

[984] Richard H. Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse', *Columbia Law Review*, Vol. 97, January (1997), 1-56.

[985] David Sugarman, 'The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science', *The Modern Law Review*, Vol. 46, Jan. (1983), 102-110.

that although local authorities have no formal status in constitutional law, their legal status as legal persons may be protected by the courts in their role of interpreting and upholding statutory provisions, according to one of the pillars of the British constitution, the rule of law.

It should be remembered that constitutional conventions play a role in coordinating the relationship between central and local governments in the absence of constitutional protection in the English context (discussed in chapter 4). The most important conventions, as demonstrated in chapter 4, including that of local self-government, have provided a practical framework which regulates the exercise of power in local government. Of course, local self-government is not carried out in a perfect way in the English context, but it has set a benchmark for both the central and local governments in the exercise of powers, especially after the ratification of the European Charter of Local-Self-Government in 1998. Conventions are confirmed by the courts in the judicial process, and their authority can only be challenged or safeguarded by the courts[986]. The method of exercising discretionary power is also challengeable in the courts, and some significant principles, like the fiduciary duty doctrine, *Wednesbury* un-reasonableness, have developed from this common law approach. Thus, it may be argued that although theoretically the status of local government is vulnerable in the English context, nevertheless powers of local government, and local government itself is subject to a series of constitutional rationales.

5.2.2 The Dependent Fiscal Situation of Local Government.

A further problem is based on the fact that local finance in the two countries depends on central government, and this demonstrates the fiscal situation of local government in both mainland China and England. In a sense, this problem arises as an inevitable consequence of the unclear status of local authorities in the Constitution or constitutional law. In mainland China the fiscal

[986] Joseph Jaconelli, 'Do Constitutional Convention Binds?' *The Cambridge Law Journal*, Vol. 64, March (2005), 149-176.

dependency of local government is a consequence of the revenue-sharing scheme initiated with the enactment of the Budget Law in 1994 (discussed in chapter 2); in England measures involving the capping of council tax, putting a ceiling of local spending, and determining the amount of the grant aid from central government, revealed the financial reality that 65 per cent of local revenue is funded by the central government (discussed in chapter 4).

5.2.2.1 Fiscal Dependency upon Central Government against "Revenue Centralizing and Expenditure Decentralizing" in Mainland China.

As discussed in chapter 2, the ambiguous status of Chinese local government in the 1982 Constitution, leads to its vulnerability, especially in the functional arrangement. Generally speaking, this kind of passivity may produce a weaker finance in local government, but in the Chinese context, weakness and vulnerability are only one side of local government finance; the other side is the uncontrolled use of fiscal power in the name of land finance. The section focuses only on the former side, the fiscal dependency of Chinese local government; and the latter is discussed in the "differences" as the actuality of the exercise of fiscal power in local authorities.

Based on the findings in chapter 2, the fiscal situation of local government in mainland China is associated with the existing fiscal system, the revenue-sharing scheme. The revenue-sharing scheme was put into effect along with the enactment of the Budget Law in 1994, and the original target of the scheme was to strengthen fiscal centralization.[987] This was due to the negative influence on central finance resulting from "the decentralization of power and the transfer of profit (*fangquanrangli*, 放权让利)"[988], the third decentralization experiment which operated between 1976 and 1994. In the light of "the decentralization of power and the transfer of profit", local government controlled more and more revenue, and central government even had to borrow

[987] Zhu Daqi, 'Questions on local Revenue under the Revenue-Sharing Scheme', *Anhui University Law Review*, No.2 (2007), 19-28.

[988] Yang Zhiyong, 'How the Revenue-Sharing Scheme was launched?' *Sub-national Fiscal Research*, No.10 (2013), 6-10.

money from local government[989]. Against such a backdrop, the core measure of the revenue-sharing scheme is to divide revenue between the central and local governments by setting different categories for central tax, local tax and central-local shared tax[990]. At the same time, the transfer payment system was also established to complement revenue-sharing[991] through a payment from central government, just like grants in England, and designed to equalize fiscal disparity between different local authorities, and to realize the equalization of the public service.[992]

The revenue-sharing scheme seems to have successfully met its pre-established target, that is, to centralize local government revenue and to strengthen the financial basis of central government.[993] As a result, local government in mainland China is in a state of fiscal dependency on the central government. On the one hand, an unparalleled centralization in terms of fiscal revenue was established; amongst the elements underpinning the financial centralization, tax legislative power is still firmly and exclusively enjoyed by central government. This means the power to determine tax rates and a tax base is still exclusive to the central government, and local government has to rely on central government for the category and rates of local tax. On the other hand, although central tax, local tax, and central-local shared tax have been established in the light of the revenue-sharing scheme, there remains an issue of how to divide the responsibilities between central government and local government in terms of expenditure, and this has not been settled in any Chinese law. Under the general principle in the 1982 Chinese Constitution, "giving full scope to the creativity, initiative and enthusiasm of local authorities under the unified leadership of central government," functions which should be undertaken by local government,

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989 Zhou Feizhou, 'Revenue-Sharing Scheme: Institution and Its Effect', *Social Science in China*, No. 6 (2006), 100-115.
990 Peng Yuelan, 'An Examination of Issues on Revenue-Sharing Scheme', *Public Finance Research*, No.3 (2001), 44-45.
991 Dong Zaiping & Ling Rongan, 'A Study of the Equalization Effect and the Potential Improvement of Transfer Payment System', *Contemporary Economic Research*, No.5 (2008), 55-59.
992 Dai Yi, 'Theoretical Analysis and Practical Reflection on Transfer Payment System', *Inquiry into Economic Issues*, No. 6 (2008), 9-12.
993 Tao Yong, 'An Examination of the Revenue-Sharing Scheme on Local Government Finance', *Taxation Research*, No. 4 (2008), 10-14.

share a high similarity with those of the central government. Due to these similarities, central government always transfer spending items which were previously funded by the central government (for example, education, public health and pensions), along with the differentiation of tax categories, to local Government.[994] This situation is called revenue-centralizing and expenditure-decentralizing in Chinese academic circles, and fiscal difficulties in local authorities are always result from the imbalance between centralization and decentralization. In the processes of revenue-centralizing and expenditure-decentralizing, the transfer payment system should be a possible and legitimate resort to which local government may rely on to cope with the fiscal difficulties. But the transfer payment system is based on series of administrative documents instead of transfer payment law and the operation of the system is not open to scrutiny in Chinese context.[995] This means that without effective restrictions, the expected influence of the transfer payment system has been undermined greatly, and a strange political phenomenon, "lobbying ministry and getting money", has become an essential proportion of the daily routine of Chinese local government[996]. Of course, the phenomenon of "lobbying" has produced corruption in China, at the same time, it reveals the extent to which Chinese local government has become dependent on central government in terms of fiscal affairs, and perhaps why improper or illegal measures have developed in this field.

5.2.2.2 Fiscal Dependency upon Central Government is exercised through Capping Local Revenue, Placing a Ceiling on Local Expenditure, and Appropriating Grants in England.

As demonstrated in chapter 4, only 35 per cent of the fiscal resources enjoyed by local government is locally raised, and the rest, 65 per cent of local revenue, is funded by central

[994] Zhu Qiuxiang, 'Tendency and Feature of Adminstrative Decentralization in China', *Journal of Politics and Law*, No.11(2009), 10-18.
[995] Liu Jianwen, 'Study on the Legislation of Fiscal Transfer Payment', *Law Science Magazine*, No.5 (2005), 33-37.
[996] An Tifu, 'The Phenomenon of Lobbing Ministry and Getting Money is Questioning the Transfer Payment System', *People's Tribune*, No. 24 (2007), 20-21.

government through grant aid. The fact that local government are fiscally dependent upon the central government in England, is the inevitable result of the informal status of local government in the constitutional law, and the frequent changes of local government functions in accordance with the Parliamentary statutes, as revealed in the vicissitudes of local finance in chapter 4.

The fiscal situation of local government in the English context is the outcome of series of historical changes. In the first place, local expenditure increases or reduces with changes in the scope of public services provided and funded by local authorities. In the process, grant aid from the central government are created to make up for insufficient resources in local finance. For instance, public services saw an expansion during the nineteenth century, and grants were created to fund the new category of services, although the proportion of local expenditure covered by grants was very low at that time. With the establishment and development of a welfare state, especially after the Second World War, local expenditure went through a sharp rise, and grant aid from central government steadily increased, and this greatly undermined the independence of local finance, even local government itself (discussed in chapter 4). Although local government is able to directly control council tax, central government intervenes in local finance by requiring a percentage of local revenue. Under the Conservative government which was in office between 1979 and 1992, local revenue, from rates to council tax via community charge, was capped by the central government, and local expenditure was required not to exceed the ceiling set by the central government. "Capping" and "ceiling" strengthened central control over local finance and intensified the fiscal dependency of local authorities on the central government. At the present time, the measure of rate-capping continues to allow central government to intervene in local finance. Although the ring-fencing imposed on grant aid from central government seems to have become relaxed in local authorities,[997] it is still fair to say that the central control is enhanced due to the weak position of local authorities in the governmental

[997] Committee of Public Account (House of Commons), *Public Health England's Grant to Local Authorities: Forty-third Report of Session 2014-2015*, (London: The Stationary Office 2015), 9-12.

system in England. Perhaps this is why Chancellor of Exchequer, George Osborne, has announced a tough budget target for local authorities.

To sum up, in both China and England there are some shared problems in respect of local finance, i.e. the weak constitutional position of local government and the ability of central government to impose fiscal control over local government. An awareness of the similarity of these problems raises questions on how similar problems are dealt with in the two countries, and the following section is a response to this question.

5.3 Different Approaches.

Continued from the preceding section, this section concentrates on the different approaches, through which China and England deal with similar problems in respect of fiscal power in local government.

5.3.1 Different Trends of the Exercise of Fiscal Power.

As discussed in "similar problems", Chinese local government, in terms of constitutional status and financial situation, resembles that of its counterparts in England. That is to say that local government has no specific status in the Constitution or in constitutional law, and this leads to a passive status of local finance with the control being in the hands of central government. However, the trend in the operation of fiscal power in local government does not move along similar directions in the two countries, under a loosely comparable constitutional status and financial situation; it is clear that Chinese local government is pursuing fiscal expansion without proper control, and local finance in England provides public services within a wide set of restrictions drawn from an accountability mechanism.

5.3.1.1 Uncontrolled Fiscal Expansion in Mainland China.

The ambiguous constitutional status of local government and the fiscal dependency of local finance on central government in mainland China, produced some serious difficulties in local finance; but they did not lead to weak fiscal power in the development of local finance. On the one hand, Chinese local government are adversely affected by "revenue-centralizing and expenditure de-centralizing" due to the lack of a secure constitutional position. Theoretically speaking, the transfer payment system should have been a legitimate approach to help relieve fiscal difficulties by appropriating money from central government[998], but the system fails to work well in practice and is said to become a system of bribery[999] employed by local officials in money struggles among local authorities. On the other hand, Chinese local government is actually controlled by the party committee of the Chinese Communist Party, and one of the vital measures employed by the party committee in the domination of local officials, is the performance evaluation mechanism.[1000] The criteria for this evaluation rest largely with economic indicators, represented by the GDP, as a result, local government get caught up in a deeper fiscal dilemma against the "revenue-centralizing and expenditure de-centralizing".

The effective and frequently-used approach in relieving fiscal difficulties, or in dealing with the performance predicament of local government, rests in land finance. The basic logic of land finance is that Chinese local government sells the use right of state-owned land to real estate agents on behalf of the country, and the agents construct buildings on the land and market the properties commercially. In the process, local government obtains money for the "use right" and local tax from the transaction of commercial buildings. The money local government can get from land finance depends on the land price, that is, the higher the land price, the more money

[998] Hu Yifang & Xiong Bo, 'A Study of Potential Reform and Perfection on the Transfer Payment System', *Public Finance Research*, No.8 (2008), 48-49.

[999] Xie Rong & Wen Qianwen, 'An Examination of Fiscal Games between Central and Local Governments under the Transfer Payment System', *Chinese Public Administration*, No.7 (2005), 55-58.

[1000] Zhao Hui, 'A Study of Relations between the Performance of Local Government and the Public Credibility', *Administrative Tribune*, No.1 (2014), 14-18.

local government can obtain from the use right and the local tax produced by the selling of the buildings.

The money from land finance was deemed to be off-budget revenue, consequently the local People's Congress are unable to oversee the total amount accruing from these transactions. The amendment of the Budget Law in 2014 brings the off-budget money into the category which needs the annual examination and approval at the local People's Congress[1001], but the formal examination does not provided for the People's Congress to substantially check the collection and spending of local revenue[1002]. Moreover, the rudimentary accountability mechanisms written in the 1982 Chinese Constitution, including the administrative legal mechanism, the auditing system, the administrative mechanism, and the legal mechanism, fail to work, or at least do not mitigate the control of the Chinese Communist Party in this process. Thus, local government are provided with a great opportunity to develop local finance unlimitedly, which, in the Chinese context, represents a kind of absolute power, free from any control. In 2007, in the total amount of local revenue, 2.3 hundred million Yuan (RMB), land sale contributed 1 hundred million Yuan (RMB)[1003]. By the end of 2010, local government relied on land sale to generate 71.7% of their revenue[1004], and local finance has transformed into land finance. This facilitates local revenue to grow at super speed and creates plenty of social tragedies, group conflicts, environmental problems, wasting of resources, and even political crisis in mainland China.[1005]

[1001] See the article 4 of the Budget Law 2014.

[1002] Diao Yijun, 'The Amendment of the Budget Law and the Budgetary Examination at the People's Congress', *Journal of China National School of Administration*, No.4 (2015), 55-59.

[1003] Cheng Mo, 'Land Reform is Speeding up', *Window of South*, 29-11-2013.

[1004] Ministry of Finance of People's Republic of China, 'Report on the Implementation of Budge 2011 and the Drafted Budget 2012' (online), http://news.xinhuanet.com/politics/2012lh/2012-03/16/c_111666182.htm (accessed on 09-11-2015).

[1005] Chen Ming, 'Multiple Risks from the Land Finance and their Political Interpretations', *Reform of Economic System*, No.5 (2010), 27-31.

5.3.1.2 Restricted Fiscal Development in England.

In England, the insecure status of local government in constitutional law and the fiscal dependency of local government upon the central government give rise to fiscal pressures in local authorities, when it is required to undertake more functions in the modern welfare state. However, fiscal demand, related to the provision of public services in local authorities, is largely settled through grant aid from the central government, which operates according to Parliamentary statutes. This means, at least in a degree, local authorities in England do not arbitrarily expand their fiscal resources.

There are two points which need to be considered in terms of the restricted development of local finance in the English context. In the first place, local finance in England is limited to a set of accountability mechanisms, which leave no opportunity for local authorities to operate outside of public control, or the control of the court, central government, local auditors, or the local ombudsman. It should be noted that the administrative accountability mechanisms through central government, play a predominant role, and grants are always criticized as a mechanism of central control.[1006] This is said to undermine the foundation of local autonomy, a suggestion confirmed by the European Charter of Local Self-Government 1985. Meantime, local finance also works within a framework circumscribed by the rule of law, one of the important constitutional principles. This constitutional principle is one of those taken-for-granted expressions,[1007] but its role in fiscal control and development is a contrast to situations in mainland China.

> (1) Local government are classed as "legal persons", whose functions are originated from Parliamentary statutes, and this means that public money

[1006] Ian Leign, 'Local Government and Political Constitution', *Public Law*, No. 1 January (2014), 43-55.
[1007] Tom Bingham, *The Rule of Law*, (London: Penguin Books 2011), 3.

paid for related functions is spent on a legitimate foundation rather than the arbitrariness.

(2) Council tax is raised as a result of the legislative procedure in Parliament, and local revenue is collected in the light of a legitimate foundation as well. Local authorities may determine the tax rate within the ceiling set by the central government, and the electorates also have votes to retain a say in the tax burden (discussed in chapter 4).

(3) Grant aid from the central government is confirmed by Parliament statutes; although money from central government saw a decrease and more space is left for local authorities to decide the priorities of expenditure, the exercise of discretionary power should be limited to laws and conventions.

(4) If local authorities do not spend public money legally and reasonably, measures which are available that could be used to challenge decisions, and these may be through the judicial mechanism and the administrative judicial mechanism. In the meantime the independent auditor has a chance to check and question the spending of local government.

(5) Local finance is operated with a high level of transparency in England, and this may limit the potential room for corruption, and ensure that taxpayers have the right to know how and where public money is being spent.

Of course, the accountability mechanisms and the underlying constitutional principles cannot be regarded as watertight in the development of local government finance in the English context, and the weaknesses are discussed in 5.3.2; but the above positive trend cannot be denied, especially in its contrast to the unrestrained Chinese trend.

5.3.2 Different Results of Accountability Mechanisms.

From the different development trends of local finance in mainland China and England, Chinese local finance is expanding its fiscal resources under a failing mechanism of accountability. While in England, local government is going through restricted fiscal development within a set of

accountability mechanisms, through which local authorities are responsible for the central government, the electorate, the auditors, the public, etc. This section intends to explore the different results of the accountability mechanisms in the two countries.

5.3.2.1 The Administrative Mechanism: Challengeable vs Dominant.

In the Chinese context the administrative mechanism fails to make local government accountable for their fiscal decisions; what is more, local government always challenges the authority of central government. As discussed in chapter 2, Chinese local government has no formal status in the 1982 Constitution, and is the subject of unified leadership of central government in the light of the constitutional principle of "giving full scope to the creativity, initiative and enthusiasm of local authorities under the unified leadership of central government[1008]". In this sense, the administrative mechanism is based on "unified leadership" of central government. The question is how to carry out the "unified leadership", or what responsibilities should local government undertake to keep the "unified leadership". No clear provision is available in the 1982 Chinese Constitution to answer this question, and no specific mechanism exist in Chinese theory to safeguard the "unified leadership". In fact, "unified leadership" of the central government is often translated into a political discourse, in other words, the authoritativeness of the centre, referring to the authoritativeness of the policies by the State Council and the Central Committee of the CCP. As a result, the negotiation mechanism is the main approach to safeguard the authoritativeness, and local authorities tend to challenge the central authoritativeness through two measures, one is to set aside the policies from the central government, and the other is to misinterpret or even distort the central policies in local laws and regulations (discussed in chapter 2). [1009]

[1008] See the article 3 of the 1982 Chinese Constitution.

[1009] Zhou Feizhou, *Central-Local Relations in Contemporary China*, (Beijing: China Social Sciences Press 2014), 73-79.

In terms of the expansion of land finance, three factors may explain the failure of the administrative mechanism. The first point, suggests that land finance is a process which begins with the selling of state-owned land, and the transaction of state-owned land is permitted by the 1982 Chinese Constitution.[1010]This means that the administrative mechanism could not prevent local government from selling the state-owned land. No relevant laws are available to provide guidelines on the way in which land selling should be conducted; which includes the stated price of the land, and the selection of vendees. Only administrative documents include some regulations which are unworkable in practice. For instance, the Regulation on the Bidding and Tender Auction of the Use Right of the State-Owned Land (*zhaobiaopaimaigapaichurangguoyoujiansheyongdishiyongquanguiding*, 招标拍卖挂牌出让国有建设用地使用权规定) says that the use right of state-owned land should be transacted through procedures including bidding, tender auction, and the displaying of the terms of transaction. But how to do the bidding, tender auction, and the displaying of the terms of transaction work in practice when they are only very general provisions? This gives local government a lot of discretion, and they are able to set aside, or even to distort relevant regulations on land transaction[1011]. As a result, different provinces have different procedures in the bidding, tender and auction of state-owned land; at the centre of the process remains the desire to maximize the interests of local government[1012]. In the Chinese context, the exercise of discretionary power is a blank both in the 1982 Constitution and in Chinese political culture, although two principles may be resorted to: one is the leadership of the CCP, and the other is Cats Theory (discussed in chapter 3), which was advocated by Deng Xiaoping in carrying out the Reform and Opening-Up. The leadership of the CCP provides a political direction, and the Cats Theory stresses the economic result of relevant decisions and sidesteps the legitimacy of

[1010] See the 1988 amendment to the 1982 Chinese Constitution.

[1011] Li Xun & Hong Guozhi, 'Issues on Land Finance and Economic Development in Cities', *China Land Sciences*, No.7 (2013), 43-49.

[1012] Li Song, Gan Jinlong & Su Jingjing, 'A Study of the Issues and Countermeasures of the Bidding and Tender Auction of the Land', *Economic Review*, No.5 (2010), 70-72.

them. In practice, if a local government does not oppose the ideological and organizational control of the CCP, it is hard to argue that they are not under the leadership of the CCP; furthermore, whether the leadership of the CCP is upheld or not should be judged by the party committee of the CCP, and this means if the party committee does not declare that the leadership of the CCP has been breached, then the local government should be considered to be acting within the aims of the leadership of the CCP. Based on this kind of reasoning, the leadership of the CCP has not strengthened the administrative mechanism of accountability, to be exact, it does not pay attention to the accountability mechanism at all.

As far as the Cats Theory is concerned, the original intention of the Theory was considered to lie in the economic result of the CCP's policy and governmental decisions---"so long as the cat, white or black, can catch mice, it is a good cat[1013]". The development of land finance in local government pushes up the GDP of local government, and this may mean that the development of land finance accords with, or at least does not contradict, the Cats theory. Thus, local government challenge the central government in the expansion of land finance again and again, and no restrictions from administrative mechanism are imposed upon local government.

In contrast with situations in mainland China, the administrative mechanism in England works so well in the sense of facilitating the central control, that financial autonomy in local government has been undermined substantially, and the mechanism has become a controlling mechanism[1014]. As discussed in chapter 4, local revenue and expenditure are always capped by central government, and grant aid is finally determined by central government. The purpose of the section is to compare differences between mainland China and England in the operation of administrative mechanism as an accountability mechanism, so the emphasis is how the

[1013] Deng Xiaoping, 'How to Recover Agricultural Industry', *Renmin Ribao (People's Daily)*, 07-07-1962.

[1014] Peter John, 'Ideas and Interests; Agendas and Implementation: An Evolutionary Explanation of Policy Change in British Local Government Finance', *The British Journal of Politics and International Relations*, Vol.1 April (1999), 39-62.

mechanism works, rather than how the central government controls council tax and local expenditure.

First, local government in England are 'legal persons' established in the light of the Parliamentary statutes, and this means that both the functions of local government and the monetary resources funding the functions are circumscribed by laws. In the process, the collection of local revenue (or the introduction of local tax, including the rates, community charge and council tax), the ceiling of local expenditure, and the allocation of central grants are all based on relevant laws, just as the vicissitudes of local finance demonstrates in chapter 4. Discretionary power may not be excluded from the administrative mechanism. In England, the exercise of discretionary power in local finance is circumscribed by the spirit of the rule of law, one of the two pillars of the British constitution (discussed in chapter 4). For example, local authorities have discretionary power in spending part of the grant, but how to exercise the discretion is not an absolute arbitrary power of local government; on the contrary, the courts have developed principles in this area. According to the rationale established in *Attorney-General v Aspinall*, local government is considered to be an analogy of a trustee, who should manage financial resources for the best advantage of the beneficiary (the rate payers) under an implied "fiduciary doctrine"[1015]. In *Kruse v Johnson* the court provided an explanation of substantive reasonableness of local government decisions with a special meaning, which is manifestly unjust, or contained elements of bad faith or fraud, or involved gratuitous and oppressive interference with citizens' rights[1016]. In *Associated Provincial Picture House Ltd v Wednesbury* the interpretation of reasonableness in *Kruse* was restated and developed into the standard of an 'unreasonable decision' that no reasonable person who understood the circumstances could have accepted as being reasonable. Behind the judgements, the traditional rationale of the separation of powers, supported the courts, and their decisions should be benevolently interpreted. The disputes between central and local

[1015] See [1837] 40 ER 773 at 777.
[1016] See [1898] 2 QB 91 at 99.

governments is mainly ruled on by judges, and a case in point is the conflict between central government and the Great London Council in the early of 1980s, which was settled by the courts. Overall, the administrative mechanism is largely supported by Parliamentary statutes and the courts, and the constitutional principle of the rule of law, plays a positive role in safeguarding the relatively smooth work of the administrative mechanism. Of course, the rule of law cannot be considered as a watertight constitutional principle, for it has an inherent weakness in the English context, which is related to the question of an independent judiciary (will be discussed in the following paragraphs). As discussed in chapter 4, it is this weakness that, at least in a degree, permits the predominance of the central government in the central-local fiscal relations.

5.3.2.2 Judicial Mechanism: Formal vs Limited.

Based on the Chinese exploration in chapters 2 and 3, it is very difficult to employ the judicial mechanism to challenge decision-making in local finance in mainland China. Theoretically speaking, administrative litigation should have acted to challenging fiscal power in the fierce expansion of land finance, but there are terms and conditions which exclude local finance from administrative litigation. According to the Administrative Litigation Law (*zhonghuarenmingongheguoxingzhengsusongfa*, 中华人民共和国行政诉讼法) enacted in 1990, administrative litigation is to "protect the legitimate interest of the citizens, legal persons, and miscellaneous organization in China, to safeguard and oversee the actions of administrative branch to ensure that due functions and duties are discharged[1017]"; only specific administrative actions could be challenged by the judicial procedures. As discussed in chapter 2, the Law divides the administrative actions into abstract administrative actions and the specific administrative actions, and the specific administrative actions should be focused on specific objects with one-off effectiveness[1018]. Financial decisions aim at non-specified objects, namely associated with

[1017] See the article 2 of the Administrative Litigation Law.

[1018] Jiang Mingan (edited), *Administrative Law and Administrative Procedure Law* (fifth edition), (Beijing: Peking University Press & Higher Education Press 2011), 357.

common citizens or legal persons; even if they aim at particular groups, like disabled persons, they do not aim at specific person based on the academic understanding of Chinese lawyers. In this sense, local finance could not be litigated in courts. It is also worth noting that financial decisions always have common effectiveness for a period of time, and may be invoked during the period. Thus, with no one-off effectiveness, they were not litigable either. In addition, according to Administrative Litigation Law, an administrative litigation does not interrupt the implementation of involved administrative acts, and the justice period for administrative litigation is more than six month in the light of the Law[1019]. Therefore, administrative litigation may be meaningless for financial decisions, because the money may have been spent during the litigation period. The Administrative Litigation Law experienced an amendment in 2004, and the administrative action, rather than the specific administrative action, may be challenged in court[1020]. In the Chinese context, "justiciability" should not equate to a legal settlement. Even if the financial decisions are challengeable in the courts, it is very difficult for the people's court to accept and hear administrative litigation concerning land finance. Chinese courts are under the leadership of the CCP, which controls the political orientation, ideology and cadre system of the judicial branch mainly through the politics and law committee of the CCP. As discussed in chapter 3, as part of the bureaucracy, Chinese courts should play a role in ensuring the implementation of the policies of the CCP. As a result, the PLC always intervenes in the nomination and promotion of judges, and even in judgements when it sees necessary. In this sense, it is impossible for the courts to topple financial decisions of local government, because the expansion of land finance does not contradict policies of the CCP; on the contrary, it is in line with the CCP's policies in respect of economic development. Thus, administrative litigation is merely a formal mechanism in making local government accountable for their fiscal decisions.

[1019] At least three months for the hearing in the court of first instance and three months in the court of second instance.
[1020] Jiang Mingan, 'Issues on the Amendment of the Administrative Litigation Law', *Law Science*, No.3 (2014), 18-27.

Unlike the judicial mechanism in the Chinese context, which serves merely as the "slaves and maids[1021]" of the political motives of the CCP, the judicial mechanism in England, judicial review, is an applicable mechanism, which may make local government accountable for their financial decisions. As discussed in chapter 4, judicial review works as a legal mechanism through which the legitimacy of local decisions may be challenged in the courts, and the mechanism plays a role in improving public services provided or enabled by local authorities[1022]. However, the positive role of this mechanism in making local authorities answer for their fiscal policies and decisions should not be overestimated or exaggerated, and its limitations, especially in curbing powers in local government finance, should be taken seriously.

As presented in chapter 4, when Dicey discussed the meanings of the rule of law, the independence of the judicial branch was not included in his classical *Introduction to the Study of the Law of Constitution*, and this may subtly reveal the real status of the courts at that time. In fact, questions related to the independence of courts in England are not completely resolved up to the present time. Based on the findings outlined in chapter 4, the following factors demonstrate the dependent status of the judicial branch. Historically speaking, judges were subject to the King's pleasure for a time before the 1688 revolution or immediately thereafter. The King determined the appointment of judges, and could dismiss those who displeased the supreme authority; this led to potential subversion of Parliamentary sovereignty, since the King could have "persuaded" judges to interpret laws in a manner inconsistent with the intention of the Parliament through the authority of dismissal[1023]. As a result, the court was subject to the King's pleasure. The Act of Settlement enacted in 1701 began to change the situation. According to the Act, judges appointed by the Crown, who behaved with no breach of a good behaviour, would

[1021] Lin Laifan, *From Constitutional Norm to Normative Constitution: A Preface of the Normative Constitutionalism*, (Beijing: Law Press. China 2001), 46.

[1022] Lucinda Platt, Maurice Sunkin &Kerman Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England & Wales', *Journal of Public Administration Research and Theory*, 20 (2010), 243-260.

[1023] Ian Loveland, *Constitutional Law,* A *Critical Introduction* (Second Edition), (London: Butterworths 2000), 51.

not be removed at the whim of the King[1024]. Even if a judge committed a crime or behaved against moral concepts, it was the joint address of both Houses of Parliament that were required to dismiss the judge in question. The judgement of *Entick v Carrington (1765)*[1025] clearly showed that English courts were the victims of the whim of government, and were not absolutely independent of Parliament, since it retained the power of dismissing judges. In this sense, Parliament might theoretically control the constitution of judicial branch by changing the balance of the members of judges, and the change might be legally achieved in a formal sense. Besides, functional and personnel overlapping of the three branches of the state organs undermined the judicial independence. For example, the Lord Chancellor was both a senior Cabinet minister and head of the judiciary at one time, and was responsible for the judiciary, and determined their pay and pensions; a committee of the House of Lords once worked as the final court for a long period of time. The above situations partly changed with Britain's entry into the European Union, the enactment of the Human Right Act 1998 and the Constitutional Reform Act 2005. As discussed in chapter 4, as a member of the EU, the domestic law of the UK cannot contradict EU law, otherwise, the courts have authority not to adopt the national law; the Human Rights Act 1998 conferred on the courts a relatively new power in checking the executive, the implied repeal of provisions in the delegated legislation which are incompatible with one or more of the Convention rights. This means the courts are able to quash the decisions of public bodies not because they were outside their powers, or did not follow a fair procedure, but on the substantive basis that they violated human rights. The Constitutional Reform Act 2005 replaced the Lord Chancellor as head of the judiciary with the Lord Chief Justice, created the new Supreme Court, and established the Judicial Appointments Commission. Although there are substantial improvement in the status of the judicial branch in the power process in England, it is still too early to say the courts have acquired the real independence. According to Joseph Raz, the

[1024] Robert Stevens, *The English Judges, Their Role in the Changing Constitution*, (Oxford: Hart Publishing 2002), 9.
[1025] See 95 ER 807.

independence of the judiciary and the review power of the courts[1026] are vital elements which influence the role of judicial review as one of the accountability mechanisms. The relatively weak position of the judicial branch in the power process definitely, at least in a sense, facilitates the strong position of the central government in the central-local fiscal relations.

Besides, judicial review is a passive mechanism[1027], and the court could not check, on its own initiative, whether or not a decision by local government contradicts relevant laws, with no litigations initiated by a complainant. This means that judicial review is a conditional mechanism which only has limited effects. Besides, the courts always check procedural flaws in the process of fiscal decision-making, and the substantiality of local finance is apt to relate closely with political decision-making which should not be challenged by judicial mechanism[1028], as revealed in *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* (discussed in chapter 4). In this sense, the overall effect of the judicial mechanism is to confirm the political *status quo* as between central government (who hold power and can pass legislation which the courts must faithfully ally or interpret) and local authorities. This point, to a degree, is the extension of questions concerning judiciary independence, which has just provided in 5.3.2.2.

5.3.2.3 The Audit Mechanism: Controlled vs Uncontrolled.

The audit mechanism written in the 1982 Chinese Constitution does not work in practice. According to the 1982 Constitution, auditing administration should be established both in central and local governments; as for how to ensure the audit administration performs the functions independently, there is no provision in the Chinese theory (discussed in chapter 2). In fact, a branch office of audit administrations is a department of local government, and depends upon corresponding local government for money and personnel appointment, namely, it must accept

[1026] Joseph Raz, 'The Rule of Law and Its Virtue', *Law Quarterly Review*, 93(1977), 198-201.
[1027] Susan Sterett, 'Judicial Review in Britain', *Comparative Political Studies*, Vol.26, January (1994), 421-442.
[1028] Martine H. Redish, 'Judicial Review and the Political Question', *Northwestern University Law Review*, Vol. 79 (1984), 1031-1061.

the leadership of local government. In the Chinese context, local government is under the leadership or the control of the CCP, thus, the auditing bureau in local government is under the leadership of the CCP as well. The CCP controls the nomination of the auditor-general, and the audit bureau must ensure the implementation of the policies by the CCP in local government. The expansion of land finance may push the increase of local revenue and the improvement of performance centred on the GDP, and this obviously accord with the policies of the CCP in terms of economic development. Thus, it is difficult or even impossible for the auditing bureau to really check the fiscal power in local government. The only thing that the auditing bureau can do is to list some minor problems about the operation of local finance in the annual auditing report[1029]to show their existence.

In England, audit is a more effective mechanism in making local government accountable for financial decision-making. Generally speaking, the audit is responsible for "securing economy, efficiency, and effectiveness in the use of local authorities' resources[1030]", and for ensuring that "funds voted by Parliament through the grant mechanism have been properly used[1031]". This target is satisfied by the independence of the auditing process undertaken by the independent local auditors, the statutory powers enjoyed by auditors, and the potential sanctions upon relevant officers.

As discussed in chapter 4, local auditors in England are appointed by relevant local authorities in the light of the Local Audit and Accountability Act 2014, and the appointment is required to be based on a consultation with its audit panel and advices from the panel must be taken into account[1032]. This means that auditors should be free from ministerial instructions and the councils being audited. Local auditors can inspect, copy and take away relevant documents of local

[1029] Zhang Xianyong, *A Study of the Budget Power*, (Beijing: Chinese Democratic and Legal System Press 2008), 3.
[1030] See the section 35 of the Local Audit and Accountability Act 2014.
[1031] Ian Leigh, *Law, Politics and Local Democracy*, (Oxford: Oxford University Press 2000), 116.
[1032] See the section 8 of the Local Audit and Accountability Act 2014.

authorities to ensure the general duties authorized are smoothly carried out[1033]. Furthermore, a local auditor has the statutory authority to launch a judicial review if a decision of local authorities has effect on the accounts of the councils[1034]. Thus, local auditors may play an effective positive role in making local authorities accountable for their fiscal decisions and policies. It should be noted that England is in a transitional period in terms of the improvement of the new audit system established in accordance with the Local Audit and Accountability Act 2014, thus, it is too early to conclude that local auditors can work independently and faultlessly.

5.3.2.4 The Disclosure of Fiscal Information: Weak vs Powerful.

According to chapters 2 and 3, the disclosure of fiscal information is now standing at the starting stage in mainland China, and the mechanism is not put into full play. The State Council of China enacted The Regulation on the Disclosure of Government Information (*zhengfuxinxigongkaitiaoli*, 政府信息公开条例) in 2007, and the Regulation requires central and local governments to open governmental information[1035]. After the Regulation, no government, either central or local, discloses financial information, for there is no specific provision about what to publish, or how to publish. In August 2014, the Budget Law 1994 saw an amendment after a ten-year operation, and the article 14 of the amendment expresses the freedom of financial information in rudimentary terms. According to the amendment, local budget approved by the People's Congress at the same level should be made available to the public within 20 days of its approval.[1036] The finance bureau of various levels takes the responsibility for the disclosure of relevant information[1037]. However, the questions about where to open, whether or not the public could check the financial report in person, the extent to which financial information should be opened (in a total number or in details), are still left untouched.

[1033] See the section 22 of the Local Audit and Accountability Act 2014.
[1034] See the section 31 of the Local Audit and Accountability Act 2014.
[1035] See the article 10 of the Regulation on the Disclosure of Government Information.
[1036] See the article 14 of the Budget Law.
[1037] ibid

After the amendment of the Budget Law, the platform of fiscal publication centres on websites rather than hard copy publishing; only total numbers in terms of local revenue and local expenditure are published. From the figures online, the public could not reconcile the revenue and expenditure with the decisions and the conduct of local government (discussed in chapter 2). In fact, it is the CCP that stand behind the disclosure of fiscal information in local government, and the disclosure seems to be a mere tool employed by the CCP to combat corruption and to maintain its domination as long as possible, rather than an accountability mechanism to make local government account for their fiscal policies or decisions (discussed in chapter 3).

In England, the disclosure of fiscal information in local government is now in an advanced stage, despite the freedom of information being a very recent legislative addition.[1038] It seems that the operation of local government has been exposed in public eyes through the disclosure of fiscal information. First, the Freedom of Information Act 2000 lays a firm foundation for the openness, transparency, trust, and accountability in public sectors. As discussed in chapter 4, local authorities should publish governmental information in strict accordance with the "publication scheme" approved by the Information Commissioner's Office in the light of the Act. Secondly, local government transparency in financial affairs has been pushed by the Code of Recommended Practice for Local Authorities on Data Transparency 2011 and Local Government Transparency Code 2014 (which has been updated by the 2015 Code, with no substantial changes in the criterion of fiscal disclosure). Based on the Act and Codes, governmental information about local finance is divided into two categories: must-be-published information and recommended-published information. The group of "must-be-published" includes[1039]: (1) details about individual item of expenditure exceeding £500; (2) details of every transaction on a Government Procurement card; (3) details of every invitation to bid for contracts to provide goods or services

[1038] Emily Carter, 'The New Code: the Next Step in Local Government Transparency', *Freedom of Information*, 10(5) (2014), 6-8.

[1039] See the part 2 of the Local Government Transparency Code 2015 (online), https://www.gov.uk/government/publications/local-government-transparency-code-2015 (accessed on 28-10-2015).

with a value exceeding £5000; (4) details of any contract, commissioned activity, purchase order, framework agreement and any other legally enforceable agreement with a value exceeding £5000. At the same time, senior salaries are required to publish[1040]: (i) the number of employees whose remuneration is at least £50,000 in brackets of £5000; (ii) details of remuneration and job title of certain senior employees whose salary is at least £50,000; (iii) employees whose salaries are £150,000 or more must also be identified by name.

In addition, fiscal information of local government should be published in the website www.gov.uk; any member of the public, no matter journalist, local resident, foreign researcher, or public authority employee, is entitled to request relevant information from local government. Thus, the public can easily access detailed information about local finance. This is undoubtedly an effective method to check the reasonableness (or legitimacy) of local policies and make local government accountable for them, to safeguard the citizen's right to know how local revenue is spent, and to take precautions against corruption in local government. It should be noted that although England has an advanced system in the disclosure of fiscal information, it is not a perfect one, this means that limitations should be taken into consideration in evaluating this system.

As discussed in chapter 4, most of the requirements concerning how to publish the information and what need to be published in local government finance are, currently, formulated by administrative documents, like Local Government Transparency Codes 2014 and 2015 by the Department for Communities and Local Government, rather than acts by Parliament, and this may give rise to, potential instability, or frequent changes in the criterion of disclosure according to the changes of the central government policies, or the minister of relevant Department. Although the above mentioned 2015 Code did not substantially change the 2014 Code, the likelihood of changes cannot be denied, due to the administrative nature of the criterion. Besides,

[1040] ibid

the disclosure of fiscal information costs, and in 2010, relevant spending amount to £31.6 million (mentioned in 4.3.4), although it may help to save the expenditure which accrue from the disclosure of inappropriate use of public money or, more importantly, fear of such disclosure.

5.3.2.5 The Electoral Mechanism: Manipulative vs Indifference.

Theoretically speaking, the 1982 Chinese Constitution states that the people should be the masters of China, and the system of the People's Congress is a device to realize Chinese popular sovereignty which is regarded to be the distinctive feature showing the socialist characteristics[1041]. In accordance with the system of the People's Congress, local government should be responsible for their decision-making to Chinese people. In reality, the bottom-up mechanism is disregarded by the leadership of the CCP, and the top-down mechanism actually controls the People's Congress, the administrative branch and the judicial branch, through the political orientation, ideology and the cadre system (discussed in chapter 3). Under this kind of mechanism, the party committee of the CCP at local level substantially determines decision-making, and the financial expansion in local government originates from this top-down mechanism, especially the performance evaluation mechanism (discussed in chapter 3). Objectively speaking, it is impossible for the top-down mechanism to co-exist with the bottom-up mechanism, and the public is only a decoration of the top-down mechanism to display the so-called legitimacy of the regime.

In England, the democratic mechanism through electorates does not work perfectly in local authorities, and there are still rooms for the mechanism to improve. The key issue in this area is the apathy of electorates in local elections, and the on-going low turnouts in local elections express the fact that the electoral mechanism does not inspire people to vote and thus make local government accountable for their fiscal decisions. Against this backdrop, the proposals of "direct"

[1041] Zhao Shichen, 'A Study of the System of People's Congress ', *Journal of Northeast Normal University (Social Sciences)*, No.1 (1998), 5-10.

or "deliberate" democratic experiments have been tabled to respond to the low turnout of local elections, and measures include local referendums, citizens' juries, services user panels, questionnaires, and focus groups[1042]. However, a view has been expressed that measures to reinvigorate local democracy will fall flat unless councils regain control over local finance[1043]. In a degree, the practical effect of electoral mechanism is associated with the extent to which local self-government performs. As discussed in chapter 4, local self-government is a famous constitutional convention in the English context, and this convention saw a decline in the development of the welfare state, especially after the Second World War. Although the UK ratified the European Charter of Local Self-Government 1985 in 1998, and the Localism Act 2011 conferred a general power of competence to local authorities, it is still controversial to say there is a sign which indicates the reversion of local self-government in England. The trend of devolution in the UK has set precedents that it is possible to be responsive to local opinion and needs, and devolved areas under a centralized system may promote the improvement of local self-government in England, and may promote the development of the electoral mechanism.

5.3.2.6 The Administrative Judicial Mechanism: Inactive vs Effective.

In mainland China, the administrative review is a kind of institutional device which bears some characteristics of administrative judicial mechanism. The Administrative Review Law(*zhonghuarenmingongheguoxingzhengfuyifa*, 中华人民共和国行政复议法) was enacted in 1999, and the Law replaced the Regulation on Administrative Review (*zhonghuarenmingongheguoxingzhengfuyitiaoli*, 中华人民共和国行政复议条例), having effect between 1991 and 1999. According to the Administrative Review Law, the specific administrative act of administrative organs may be challenged by citizens, legal persons or other social organizations whose rights or interests are adversely influenced by the act[1044], and the

[1042] Jeffrey Jowell & Dawn Oliver, *The Changing Constitution*, (Oxford: Oxford University Press 2011), 247.
[1043] ibid, 240.
[1044] See the article 2 of the Administrative Review Law.

reviewing body is the administrative authorities at a higher level. For instance, if the specific administrative action of a health bureau in a county level is challenged by a citizen, the reviewing body may be the county government, or the health bureau in next higher level, the health bureau in city level. Therefore, the administrative review is based on the Chinese governmental hierarchy,[1045] and should work as a system of self-correction or self-supervision within the administrative system[1046]. The administrative review charges the complainant no money, and always needs a shorter period to settle the complaint. Different reviews concerning different services have different requirement periods, the shortest needs 15 days and the longest 90 days. However, the procedures of administrative review is kept secret by the reviewing body[1047]due to the weakness in the freedom of information (discussed in chapter 2), and the complainant does not know what the reviewing body do in the resolution of disputes. At the same time, the review is based totally on written materials concerning the disputes and no cross-examination take place in the process[1048], and this causes distrust on behalf of the complainant. Whatever the advantages or disadvantages are, only a very small part of the specific administrative act of collecting taxes can be challenged by administrative review. Thus, the administrative review could do nothing for the expansion of land finance.

In England, the administrative judicial mechanism, a non-court based mechanism, is realized through the Local Government Ombudsman. As discussed in chapter 4, a LGO may make local government accountable for their financial decisions by investigating the complaints of maladministration in local authorities. Although a LGO is part of the administrative branch within the governmental system in England, it is independent of local government. The appointment of LGO is subject to Parliament, and the money supporting their routine work is

[1045] Zhang Chunsheng & Tong Weidong, 'Development and Perfection of Administrative Review System in China', *China Legal Science*, No 4 (1999), 51-56.
[1046] Liu Shen, 'Debates on the Functions of Administrative Review Law', *Legal Forum*, No.5 (2011), 10-15.
[1047] ibid
[1048] Liu Shen, 'Focal Point of Reforms on Administrative Review: Reconstructing the Reviewing Body', *Administrative Law Review*, No.2 (2012), 44-48.

approved by Parliament as well. To a degree, the independent finance and appointment is an important precondition of the independent investigation and judgment of the Ombudsman. The Ombudsman charges the complainants no money, and the complaint can be made online, or by making a phone call, or by post. However, not all areas of local finance can be challenged by the non-court based mechanism, and problems about (i) the classification of council tax band;(ii) whether a person is liable for council tax;(iii) whether a property is the main residence or second home; (iv) whether a person is entitled to an exemption or discount; (v) whether an empty property premium applies; and (vi) the judgment of a student for council tax purposes [1049]are all beyond the investigation of local government Ombudsman.

The investigation focuses on whether local government is properly providing services or enabling relevant services, whether there is an inaction of local government in providing services, the failure of local government in following due procedure or relevant laws, the failure of local government in communicating with the complainant in the process of services, etc. In addition, there is no explicit definition about maladministration, and this may give rise to some subjectivity of the part of the LGO. Overall, the LGO works well in making local government accountable for their financial decision-making in a limited range, and the mechanism, to a degree, complements judicial review mechanisms.

5.3.3 Power; Doctrine; Divergency.

The entirely different exercise of fiscal power in local government in the two countries -one is unrestricted and the other is limited, and the different results of the accountability mechanisms, one fails to work, and the other plays an active role in making local government accountable, are the inevitable consequence of the different power doctrine observed by the two countries. This

[1049] See the official website of local government ombudsman http://www.lgo.org.uk/publications/fact-sheets/complaints-about-council-tax/ (accessed on 20-10-2015).

section will explore the differences in respect of power principles in mainland China and England, which underlie the operation of accountability mechanisms.

5.3.3.1 The Socialist Rule of Law vs the Rule of Law.

As demonstrated in chapter 2, the socialist rule of law, created by the Chinese Communist Party in the process of Reform and Opening-Up, is written in the Chinese theory as one of the power principles, and the principle is frequently invoked by senior leaders of the CCP. It seems the Chinese political circle manages to carry a signal (at least to Chinese people) that power in mainland China is submitted to the rule of law with the socialist characteristics. In fact, Chinese power practice has nothing to do with the rule of law as understood in Britain as a constitutional principle. First, the CCP tightly controls the People's Congress by direct and indirect measures; the legislative power (one of the important functions of the People's Congress) becomes only an instrument to legalize the policies of the CCP (discussed in chapter 3). In the process, the bottom-up democratic mechanism is only a paper provision, and the Chinese people determine nothing in the formation of the laws.

Secondly, the judicial system takes order from the CCP: (i) the chief judge is controlled by the CCP through the formal nomination of the People's Congress, and the PLC takes charge of the political correctness of the routine work of the judges (discussed in chapter 3). (ii) The CCP always intervenes in the judgments of the cases through the political and law committee, and policies of the CCP actually stay out of the laws (discussed in chapter 3), or the policies of the CCP take priority of the laws. Thus, the judicial branches are the subordinate of the CCP, and the court works as part of the Chinese bureaucracy, rather than an independent body. This kind of power logic may exclude the judicial approaches in the resolution of conflicts between different power branches, and the CCP itself acts as the final adjudicator in the process. As discussed in chapter 2, the Chinese laws are based on the policies of the CCP. Once a policy

becomes a law, it is not easy changed; meantime, the policies of the CCP are being changed all the time, and the laws could not be amended quite so frequently. So, the CCP needs to set aside the laws, which are outdated, according to its own will and interest. (iii) As discussed in chapter 3, the CCP controls the administrative branch, through the party committee at local levels, and through the substantial nomination of the cadres, which is theoretically enjoyed by the People's Congress. The administrative branch should be the executive branch of the People's Congress[1050]; in the Chinese context, it becomes the executive of the CCP, and what it carries out is the polies of a political party, rather than laws of the country.

In sum, the Chinese state organs are permeated by the power of the CCP, and the laws by the NPC (or its standing committee), the national legislature, give way to the power of the CCP; in this sense, the socialist rule of law, the so-called rule of law in the Chinese version, works as a mere decoration of the rule of power.

In the English context, the rule of law, as a constitutional principle, was coined by a distinguished lawyer A.V. Dicey in the theory of the exercise of state power. Dicey coined the expression and gave it three meanings discussed in chapter 4. Although Dicey was criticized as the concept developed historically, and alternative versions of the concept were widely canvassed, some basic points, the legitimacy of public power, the equality before statutes, and the legal application by the court, has never been abandoned.

First, the Diceyan approach to the rule of law, as adopted in Britain, seeks to outline and legitimate the basic power logic and proper interactions between public bodies: the rule of law respects the supremacy of the Parliamentary statutes, and the state organs are under not above the law. According to the official website of Parliament www.parliament.uk, debating and passing laws is one of the three main roles of Parliament, and the laws give legitimacy to

[1050] Liu Xinli, 'A Study of the Supervision on the Chinese Government by the People's Congress', *People's Congress Studying*, No.5 (2001), 9-13.

governmental powers. Of course, the UK, as a member of EU, should be subject to the European Union law, and this means that EU law prevails over the domestic law and the sovereignty of Parliament is limited.[1051] With the enactment of the Human Rights Act 1998, the supremacy of Parliament as a legislature should be subject to the European Convention on Human Rights, and the courts have right to dis-apply the Parliament laws if they are incompatible with ECHR through an "implied repeal". The "dis-apply" is to announce the incompatibility, not to "deny" the supreme status of Parliament in the legislative procedure (discussed in chapter 4). Besides, the rule of law does not negate the discretion of the administrative branch, and how to exercise the discretionary power in the English context is interpreted within the framework of the rule of law (discussed in chapter 4). It should be noted that Dicey did not touch upon the independence of the judiciary in his classical definition of the rule of law. This may have disguised the real status of the judiciary at that time. The significance of an independent court in safeguarding the spirit of this important constitutional principle, the rule of law, was stressed by Joseph Raz in 1977, and the weakness of this well-known constitutional rationale may be demonstrated according to the position of Joseph Raz as well. Generally speaking, the courts in England enjoy a weak place in power structure. According to the evolutionary feature of the constitutional system in England, it is reasonable to consider relevant question from a historical standpoint. In the first place, although the judges would not be removed simply at the whim of the King after the Act of Settlement enacted in 1701, Parliament may theoretically control the constitution of the judicial branch by changing the balance of the members of judges. Meantime, The Lord Chancellor was both a senior Cabinet minister and head of the judiciary at one time, and he determined the judges' pay and pensions. Besides, laws may be amended at the whim of Parliament in the light of Parliamentary Sovereignty, and this may lead to the exclusion of judicial review from some governmental decisions, like the ouster clauses. In addition, the Appellate Committee of the House of Lords once worked as the final court. Here it should be

[1051] Jack Beatson, 'Reforming an Unwritten Constitution', *Law Quarterly Review*, 126 (2010), 48-71.

noted that the existence of the Appellate Committee did not mean arbitrariness in dealing with business related to appeal and legislative work. In fact, there were very strict rules in the involvement of Law Lords as legislators. As discussed in chapter 4, two principles may help to explain how it was possible for a Law Lord to avoid bias when participating in debates and votes in the legislative work. First, they did not think it appropriate to engage in matters with a strong element of party political controversy; and secondly they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal to the House.[1052]

The above situation saw some changes under the joint influence of the European Union, the enactment of the Human Rights Act 1998 and the Constitutional Reform Act 2005. The influence of EU and the Human Rights Act 1998 has been discussed in 4.4.3, and that of the Constitutional Reform Act 2005 will be further discussed in 5.3.3.2. In brief, the Constitutional Reform Act 2005 replaced the Lord Chancellor as head of the judiciary by the Lord Chief Justice, created the new Supreme Court, and established the Judicial Appointments Commission, and positive developments may be expected. However, it is still controversial to say an independent judiciary has been established in England. On the one hand, it is too early to evaluate the effect of the new Supreme Court, the Lord Chief Justice, and the Judicial Appointments Commission, and some lawyers argued that relevant changes were of form than substance[1053]; on the other hand, the courts are not generated from the democratic procedure, and a strong position of the judiciary may conflict the spirit of representative democracy, especially under the constitutional principle of Parliamentary Sovereignty. In this sense, the rule of law, as a constitutional principle, has an inherent limitation, which make judicial independence an ideal. This limitation pushes the passive nature of the judicial review and the political question doctrine, and results in the

[1052] David Hope, *Law Lords in Parliament*, 176.

[1053] Glenn Dymond, *The Appellate Jurisdiction of the House of Lords*, 53-56.

weakness of the judicial mechanism in making local government accountable and the predominant place of the administrative mechanism through the central government.

5.3.3.2 The Issue of the People's Congress vs the Separation of Powers.

Chinese power is organized on a base of fusion between state organs. As discussed in chapter 3, the People's Congress is designed to be the headquarters of power in theory, that is, both the administrative and judicial branches are generated by, and responsible for People's Congress. It has to be understood that People's Congress is elected directly or indirectly by Chinese people, thus, the system of the People's Congress theoretically represents popular sovereignty; this system works through the fusion of power, which is regarded as being based on a bottom-up democratic mechanism to safeguard the realization of the popular sovereignty.[1054] In the Chinese context, the system is called 'the people being the master of the country'[1055]. According to the institutional design of this system there is no separation of powers in mainland China, for the Chinese state power as a whole is announced to be enjoyed by Chinese people, and the "tripartite" political system is regarded as being the reduction of the people's power[1056]; at the same time, the powers are considered to be ultimately enjoyed and exercised by the people, and the supremacy of the people's power will be infringed if the power is checked with each other.[1057] In practice, the People's Congress seems to work as a convenience which facilitates the realization of the absolute control of the CCP over the state power (discussed in chapter 3), in this sense, it may be the causal element for such unaccountability of local government as the failure of the judicial

[1054] Lin Bohai, 'The Chinese Logic in Upholding the System of the People's Congress', *Studies in Ideological Education*, No.3 (2009), 11-15.
[1055] Chang Qiao, 'The Essence of the Socialist Democracy Lies in the People Being the Master of the Country', *Scientific Socialism*, No. 3 (2008), 66-70.
[1056] Li Shenming, 'The Starting Point and Standpoint of the Socialist Democratic Politics rests with the People Being the Master of the Country', *Journal of Political Science*, No.2 (2005), 3-7.
[1057] Qiu Zhiquan & Liu Pingchang, 'A Study on Inapplicability of checking and balancing Powers', *Theory Research*, No.7 (2011), 70-71.

mechanism and electoral mechanism in checking the administrative power (discussed in chapter 3).

Based on chapter 4, England organizes powers on a basis of fusion[1058], although the separation of powers, as a measure to restrict the potential of power abuse, was first discussed as far back as the mid-seventeenth century[1059]. However, the English fusion is different from the Chinese fusion, and no branch seems to enjoy a controlling authority in England. First, there are check and balance between the state organs. As discussed in chapter 4, Parliament checks the execution through such constitutional conventions as the individual ministerial responsibility, and through such practical measures as Parliament questions, debates, motions and Select Committees. At the same time, the courts check the administrative power through the judicial review. Of course, there are areas, like the making of treaties, the disposal of the armed forces, the defense of the realm, which cannot be checked by the courts, and there are limitations of the judicial mechanism due to the question of judicial independence. Judicial review is workable in the English context and provides a mechanism to challenge the government. As discussed in chapter 4, the courts may set aside delegated legislation, which are incompatible with the EU law and the Human Rights Act 1998. Besides, the courts check legislative power through implied repeal, due to the influence of the EU laws and the Human Rights Act 1998, which has been discussed in 5.3.3.1.

It should be noted that the checks and balances in England are not perfect, and the separation of powers is still a political ideal. The main weakness in this area is the place of judicial branch in the power structure, which has been presented in chapter 4 and discussed in 5.3.2.2 and 5.3.3.1 in this chapter. The uncodified constitution in England is in an evolutional process, and the judicial position is changing, especially after the Constitutional Reform Act 2005. Currently,

[1058] Gavin Drewry, *The Executive: Towards Accountable Government and Effective Governance?* in Jeffrey Jowell & Dawn Oliver (edited), *The Changing Constitution* (seventh edition), (Offord: Oxford University Press 2011), 187.
[1059] Colin Turpin & Adam Tompkins, *British Government and the Constitution* (sixth edition), (Cambridge: Cambridge University Press 2007), 103.

although there are opinions that the Act has pushed judicial independence in England, and the role of the Supreme Court, will be visible to all, there are still reservations in the operational effects of relevant reforms.[1060] In the first place, the justices of the new Supreme Court are the former 12 Lords of Appeal in Ordinary in office.[1061] Secondly, the new Supreme Court takes over the appellate functions which shared by the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council, and its judges are not given new powers which were not exercised by the Law Lords, with the exception of being able to rule on devolution issues.[1062]All in all, although the independence of the judiciary cannot be concluded at the present time, judicial independence in England is still interesting insofar as judges are disqualified from sitting and voting in the House of Lords as long as they remain Justices of the Supreme Court, and are also disqualified from the Commons.[1063]

5.4 Conclusion.

Based on the above comparisons, China and England are faced with similar problems in local government finance. Chinese local finance is controlled by central government through the revenue-sharing scheme, due to the vague status of local authorities in the 1982 Constitution. Central control gives rise to fiscal difficulties in local government, and fiscal dependency of local finance upon central government. The fiscal difficulties, or fiscal pressures, has a potential to produce Chinese issues. The arbitrariness of fiscal power in the expansion of land finance, is a source of Chinese social problems, like corruption, the infringement of human rights, and even the fiscal risks in local finance. In England, local finance is controlled by central government through the grant aid on the one hand, and on the other hand, the ceiling of local expenditure and the capping of local revenue. The ill-defined status of local authorities in constitutional law is the

[1060] Glenn Dymond, *The Appellate Jurisdiction of the House of Lords*, 53-56.
[1061] See the section 23, 24 of the Constitutional Reform Act 2005.
[1062] G Glenn Dymond, *The Appellate Jurisdiction of the House of Lords*, 30.
[1063] Ibid

main reason which produces the weak place of local government finance. As a result, the trend of fiscal centralism in England leads to the fiscal dependency of local councils on central government, this undermines local autonomy, even marginalizing the role of the local electorate in the decision-making.

Whilst overall, England and China face problems in respect of Local government; approaches to organizing and reviewing local government finance in the two countries deviates in many ways. In China, local government is expanding fiscal sources in the name of land finance without proper control over the power process; while in England, local finance is undergoing a restricted development, and contributes to the provisions of public services. In terms of constitutional comparisons, this means similar problems have different results, and the approaches through which the two countries deal with their local finance, are of significance in the illustration of the Chinese issues.

Perhaps it is fair to suggest that "arbitrariness" may be a key word in any analyse of Chinese issues, and of seeking a way forward for Chinese local government finance. Based on comparisons, "arbitrariness", in Chinese context, may be summarised as: Chinese local government is expanding fiscal resources against the failure of accountability mechanisms, and governmental power is actually free from scrutiny of any kind in the process of financial expansion in the name of land finance (discussed in chapters 2 and 3, and illustrated in the previous sections of this chapter). This arbitrariness has led to the infringement of human rights, corruption, and even environmental pollution, etc., which has been touched in chapters 1 and 3. From the perspective of constitutional law, arbitrariness may represent the unlimited exercise of public power, and the incapability of constitutional theories in power process to curb this power. The 1982 Chinese Constitution does not provide a systematic mechanism for managing powers, and the system of the people's congress provides a political announcement that Chinese people enjoy the supreme power on a fusion of powers, with no check and balance between the state

organs (discussed in chapter 2.2.1). The socialist rule of law, in fact, stresses the supremacy of the CCP in Chinese power process by introducing some principles of values, like justice, equality, but no specific measure to carry out these values except for the maintenance of the leadership of the CCP (discussed in 2.2.2). The leadership of the CCP produces, in practice, the overwhelming control of the CCP over the exercise of powers, and this invalidate the rudimentary accountability mechanisms written in the 1982 Chinese Constitution (discussed in 3.3). As a result, fiscal decision-making is always free from the examination of the people's congress, unchallengeable in people's court, subject to formal disclosure of information and auditing.

However, unlike their Chinese counterparts, local authorities in England have no room to exercise their powers in an arbitrary manner. There are drawbacks in the mechanisms, as presented in chapter 4, and this means the operation of the accountability mechanisms are not perfect in the English context. Although there are difficulties, fiscal power is not out of control, because all the mechanisms are workable in practice. From a perspective of constitutional law, local fiscal power in England is scrutinised by some power mechanisms, and underpinned by constitutional theories; that is to say, constitutional theory in England is workable in imposing restrictions on the exercise of fiscal power in local government.

In the English context, the institutionalised restriction of fiscal powers may date back to the signature of Magna Carta in 1215. In modern times, the constitution principles, the rule of law and the separation of powers, seem to jointly produce the controllability of fiscal power in local authorities, although there are successes and weaknesses of the accountability mechanisms. In the first place, the rule of law, as one of the two pillars of the British constitution, may provide some basic foundations for the exercise of powers. As discussed in chapter 4 and the section 3 of this chapter, the rule of law may be a debatable expression, but according to the Diceyan version, the legitimacy of public power, and the legal check by the court, have never been abandoned. As a result, fiscal power in local government should be exercised on the authorization of

Parliamentary statutes, and challengeable through judicial review. Meantime, powers in England are operated in the light of the separation of powers, or the checks and balances of powers, and this constitutional principle has been discussed in 4.4.3. The checks and balances, provide an opportunity for the scrutiny of fiscal decisions of local government by the courts, central government, the local ombudsman, local auditors, the local electorates, and even through the channel of the freedom of information. This plays a positive role in the relatively successful operation of the accountability mechanisms. However, the "checks and balances" cannot be equal to the real separation of powers, but at least, fiscal power could be restricted and the accountability mechanisms work well against the "checks and balances".

The contrast between the arbitrariness of fiscal power in Chinese context and the controllability of the fiscal power in England, may provide some useful perspectives in the seeking of solutions for Chinese issues. Broadly speaking, the focus of relevant solutions may be based upon such notions that accountability mechanisms should be workable, and the arbitrariness of fiscal power should be restricted by some constitutional system, just like what happens in England, given the research method of this thesis. It should be noted that the Chinese government is seeking to forestall a Magna Carta Moment in China[1064], and this may mean changes will take place in the restriction of public power. Based on this consideration, potential solutions for Chinese issues may include: (1) radical reforms in the constitutional theories, in particular the system of people's congress and the socialist rule of law, being replaced by the checks and balance of power, and the rule of law, by drawing upon corresponding theories in England. This method may bring about fundamental changes to the accountability mechanisms, and may need radical changes in Chinese political system and even the ideology of the country to act in concert with it. (2) Subtle changes in constitutional theories by launching a reform on one or two accountability mechanisms, for instance, in the legal mechanism or governmental transparency, by drawing

[1064] China and the "Magna Carta Moment", online sources at hediplomat.com/2015/11/china-and-the-magna-carta-moment/

upon the evolutionary changes in relevant field in England. “Subtle changes” refer to some moderate reforms which will not change the political system thoroughly at a time, but they aim to produce changes step by step in Chinese constitutional theories in a relative long term. This may be acceptable or welcomed by the CCP and Chinese people. Within the two methods, which one is the potential way forward for curbing the arbitrary fiscal power in Chinese local government? Is it possible to make a radical reform to the present constitutional systems, the system of the people’s congress or the socialist rule of law? Which area may be a likely breakthrough, the legal mechanism, or the system of people’s congress? Is it reasonable to draw upon experiences from England? What to draw upon? The constitutional tenets in the British context is an important part of the Western political and legal culture, is the Western experience utilizable in the Chinese context? These questions will be discussed in the following chapter.

Chapter 6: Summary and Conclusion

The present chapter seeks to highlight key findings from previous chapters, especially Chapter 5, and to draw and summarise conclusions on the Chinese issue identified in Chapters 2 and 3. As discussed in chapter 1, this thesis will not offer ready-made solutions to the problems identified in China, in accordance with the purpose of the "reflective comparisons" which are intended to indicate matters and themes that might help to inform a distinctively Chinese approach to the perceived problems.

Based on the comparative reflection made in chapter 5, the fundamental manifestation of Chinese issues rests with the uncurbed power of local government finance, and this chapter will raise three main points. The first one is related to the causal factors of the problems of finance in local government, which are always said to arise from the question concerning "centralization---decentralization" as mentioned in chapter 1. The second point is germane to the question of whether or not the Chinese situation could be responded to, in part or in whole, by using the Western constitutional theories as a point of reference. If the answer to the second point is "yes", the third point will focus on the way forward for Chinese mechanisms dealing with the arbitrariness of local government finance, by drawing upon the British constitutional approaches. In the process, the question of the Chinese "constitutional moment", which has been referred to in chapter 1, will also be involved in general.

As set out in chapter 1, the purpose of this thesis is to seek a way forward, which may be beneficial to the settlement of the Chinese issues stemming from the unlimited power in the expansion of local government finance, and relevant issues are demonstrated through constitutional comparisons between mainland China and England. That is to say, it is hoped that reflective comparisons may help to identify different solutions, or at least provide inspiration for future developments and resolutions of some of the problems which beset Chinese issues.

Of course, the comparative approach may not be a perfect method, and there are limitations in way forward, which may not provide a fundamental cure for the Chinese malaise due to the question of "effective constitution" mentioned in chapter 1. Guided by the above considerations, the commonality of problems in the two countries are set out in the previous chapters, and different responses to similar problems are discussed in chapter 5. The different methods of dealing with similar situations may provide a useful perspective in reflecting on the deep-rooted reasons for some of the Chinese problems, and proposing the potential way forward. It may be that reform of the Chinese judicial system is a way forward, because, as can be seen from the constitutional comparisons the judicial system has performed in a similar way since the late of Qing Dynasty (or the early of the nineteenth century) in the Chinese context.

Chapter 5 suggests that local authorities in both China and England are inadequately protected in the Constitution or constitutional law. The 1982 Chinese Constitution provides local authorities with an ambiguous status, and the uncodified constitution in England, provides local government with no formal status either. As a result, constitutional safeguards in local government can be precarious in the two countries. The informal nature of the local government, to a degree, leads to the fiscal dependency of local finance upon the central government. Chinese local finance is controlled by central government through revenue-centralising and expenditure-decentralising in the light of the revenue-sharing scheme, and local finances in England are dominated by central government through the grant aid, the ceiling of local revenue and the ring-fencing of local expenditure. However, similar problems in the two countries produce different consequences. The dependency of local finance upon the central government in the Chinese context brings about fiscal difficulty in local government, and to a great extent leads to and permits arbitrariness in the expansion of land finance, which gives rise to social problems, including the infringement of human rights. The weak position of local finance in England, though problematic in many ways, does not produce the abuse of fiscal power; local authorities

work for the provision of public services in their routine work, in the process, human rights are protected, rather than violated.

Why do similar problems produce different outcomes? This is mainly as issue of how the problems are treated in the two countries. In China, local government finance operates against the failure of accountability mechanisms, even though, on the face of it, accountability mechanisms are written in the 1982 Chinese Constitution. As discussed in chapter 2, the Chinese Constitution provides some rudimentary theories which may impose limitations on the exercise of fiscal power in local government, including the political mechanism through the People's Congress, the judicial mechanism through the administrative litigation, and the auditing system. However, Chinese theories fail to work in practice. The fiscal power in Chinese local government is, in fact, free from examination or subject only to the formal examination by the People's Congress in the process of approving the annual budget. It is unchallengeable in the people's court in terms of the fiscal decisions; it is scrutinised by the toothless auditing system; it only formally discloses fiscal information, and is in open defiance with central government. As a result, local government is expanding its fiscal resources with arbitrariness. In the English context, local government finance works normally in a set of accountability mechanisms which are restrictive. As discussed in chapter 4, England has a multiplicity of accountability mechanisms in terms of the exercise of the fiscal power of local authorities, and they range from administrative mechanism, legal mechanism through judicial review, social mechanism through the freedom of information, and administrative and judicial mechanism through the ombudsman. There are also the political mechanisms through the local electorate, private law mechanism through contracting out local services, and a combination of legal, administrative, and social mechanisms through audit. Of course, the mechanisms are not perfect, and each mechanism has some advantages and disadvantages, which were discussed in chapters 4 and 5. It seems that the administrative mechanisms through central government is probably the most effective amongst the mechanisms, and this leads to the central control over local government finance. However, the mighty

administrative mechanism does not invalidate the other mechanisms; multiple mechanisms work together, which seems to leave little room for local government to abuse their fiscal power in practice.

Therefore the dissimilar approaches to the similar problems in the two countries may lead to some conclusion on the first point --- the failure of the accountability mechanisms in curbing the exercise of fiscal power in local government. Broadly speaking this epitomises the incapability of the 1982 Chinese Constitution to coordinate the exercise of state power. It is in this sense that the question of the arbitrary power in Chinese local finance is related to the question of Chinese constitutional moment, as mentioned in chapter 1.

So far, the reason for Chinese issues concerning the arbitrary power in local finance has compared how fiscal power is dealt with in England against the similar backdrop, i.e. the weak position of local finance; but fundamentally arbitrary power in the Chinese context rests with Chinese constitutional theories breaking down in practice. As discussed in chapter 1 the focus of this thesis lies in the exploration of Chinese issues, and how reflective constitutional comparisons between China and England can be utilised to demonstrate a commonality of problems, and offer a potential way forward. Forasmuch as uncontrolled power in local finance is a result of the ineffectiveness of the Chinese Constitution, the potential way forward may be related to how to activate Chinese theory in the restriction of the fiscal power through drawing on the experiences of constitutional theories in England.

Before concentrating on the alternative way forward for Chinese issues, there is still a question which needs to be clarified, and that is the possibility of China drawing on Western constitutional theories, like that of Britain. As discussed in chapter 1, from the end of the Qing Dynasty (or the early nineteenth century) Chinese constitutional comparisons began to develop as a factor to push the introduction of the constitutional ideas and theories from foreign countries, especially the

USA and UK, and the process still continues. A case in point is the provision that "the state values and safeguards human rights" written into the 1982 Chinese Constitution as an amendment in 2004. This means that although socialist characteristics are stressed in Chinese political discourse, and the conception of the "Chinization of constitutional research" is advocated in Chinese academic community, Western constitutional theories have never been rejected by China. Drawing on Western constitutional theories, especially those from the UK and the USA, constitutes the main part of Chinese constitutional comparative law. The social transition, as discussed in chapter 1, has produced a demand for political reforms in China, but the tradition of Chinese political culture could offer few opportunities. China is in the process of "Reform and Opening-Up", as mentioned in chapter 1, and drawing on advanced political systems and techniques from elsewhere is the main target of "Opening Up" and the main channel for "Reform".[1065] In addition, our era is undergoing a process of globalization, thus, it is unreasonable for a country, especially a developing country like China, to reject foreign theories, particularly if it wants to be integrated into the process of globalization. Thus, operating within the current context, China may draw on English constitutional theories in terms of the fiscal power in local government, and this is the second point of the conclusion.

Since the causal elements of Chinese issues concerning the arbitrariness of fiscal expansion in local government have been demonstrated by illustrating the exercise of fiscal power in England, and the potential for China's to draw on theories from elsewhere have been confirmed; the next question should be how to draw on the experiences or lessons from England. This point may relate to why the Chinese theories do not work in the power process, and the constitutional theories are workable in the English context.

[1065] Zhang Yunxin & Zhang Zhengguang, 'To Uphold the Socialism in the Reform and Open', *Studies on Mao Zedong and Deng Xiaoping Theories*, No. 10 (2008), 36-42.

As discussed in the constitutional comparative reflection in chapter 5, two factors may related to the inability of the accountability mechanisms in the Chinese context. The first is the fusion of power through the system of the People's Congress. As discussed in chapter 2, Chinese state power is organised on the system of the People's Congress, that is, the administrative and judicial branches are, in theory, elected by, responsible to, and overseen by the People's Congress. The power fusion of the Chinese style is to ensure that Chinese people control the power process;[1066] but it causes the accumulation of powers in practice. On the one hand, the People's Congress controls the Chinese judiciary; on the other hand, the judicial and administrative branches are controlled by the Chinese Communist Party through its domination on the People's Congress. Thus, the system of the People's Congress is unable to ensure the realization of popular sovereignty in the Chinese context; on the contrary, the accumulation of power may give rise to a lack of "confining, structuring and checking[1067]" of powers, in particular discretion, and hence a lack of accountability. In England, although different power bodies, i.e. the legislative, executive and judicial branches, wield different functions in the power process, state power is organized on an overlapping basis in terms of the functional and personnel dimensions, rather than the real separation of powers. Unlike the situation in China, the fusion of power in the English style does not give rise to the accumulation of power by one body. There are checks and balances between the power bodies, for instance, the courts may check the executive power through the system of judicial review, although the judicial branch is in a weak place in the power structure. The constitutional system has been developing in the English context, and progresses have been made in the process, for example, since the enactment of the Constitutional Reform Act 2005, judicial independence in England saw some positive changes including including the replacement of the Lord Chancellor as head of the judiciary by the Lord Chief Justice, the creation of the new Supreme Court, and the establishment of the Judicial Appointments

[1066] Yang Guanbin & Yin Donghua, 'An Examination on the Democratic Foundation of the System of the People's Congress', *Journal of Renmin University of China*, No.6 (2008), 99-105.

[1067] Kenneth Culp Davis, *Discretionary Justice, A Preliminary Inquiry*, (Connecticut: Greenwood Press, Publishers 1969), 188.

Commission, and those may push the development of separation of powers, at least, may reinforce the position of the courts in performing judicial scrutiny of the administrative power.

The second factor relates to the socialist rule of law, which implies the overwhelming control of Chinese ruling political party, the CCP, over the power process. As mentioned in the above paragraph, the CCP exerts an absolute command on the legislative, the administrative and judicial branches, through the accumulation of powers in the light of the system of the People's Congress. It controls the political orientation, ideology and cadre system of all power organs, therefore, in such a case, an effective system of accountability mechanisms may be a contradiction with the supremacy of the CCP. As a result, local finance has to be subject to the absolute control of the one and only political party in power, and this means that the way in which local government derives the finance resources and spends public money is influenced by the policies of the CCP. [1068]

In the process, the legitimacy of local revenue and expenditure are rarely challenged through administrative litigation in order that the authority of the CCP is kept supreme and untarnished. In England, powers are exercised in the light of the constitutional principle, the rule of law. According to the Diceyan version of the rule of law, powers should have a legitimate foundation through the authorization of Parliamentary statutes, and be challengeable in the courts. Dicey did not mention the independence of judiciary, which undergoes an evolutionary process in the English context, and this may reflect the status of the weakness of the operation of accountability mechanisms in England. As a result, judicial review, as an accountability mechanism, plays a limited role in making local government accountable for their fiscal policies and decisions, and facilitates the superiority of the central government over local finance. With the development of constitutional reform since 2005, the British judiciary has seen some improvements. Of course,

[1068] Liu Jianwen, 'Constitutionalism and Financial Democracy in China', *Taxation Research*, No. 4 (2008), 5-10.

it is too early to evaluate relevant changes, but more positive developments in terms of an independent judiciary may be hoped for in this circumstance.

Following the analysis of these two factors, the incapacity of Chinese theories in practice, particularly in respect of local government finance, is a consequence of the drawbacks of the system of the People's Congress, and on the other hand, the control of the CCP over the power process. These two aspects combine to invalidate the accountability mechanisms written in the Chinese Constitution. This implies that Chinese issues may be solved through the reforms of the system of the People's Congress and the removing of the control of the CCP from the power process. According to the Chinese section in chapters 2 and 3, and the constitutional comparative reflection in chapter 5, an evolutionary reform may be a reasonable option. In the first place, the system of the People's Congress is the fundamental political system in China,[1069] which facilitates the ruling position of the CCP in the power process. Thus, if reform intends to change the fundamental political system in mainland China, it is impossible to be carried out in the current political setting. Besides, the CCP monopolizes the Chinese power process, and no political forces may challenge and replace the CCP at present time. In addition, England provides some positive experiences in terms of evolutionary reforms in the constitutional system, especially in the independence of the judiciary (as discussed in chapter 4), on which the Chinese reform may draw some ideas. Thus, subtle changes, step by step, may be the most practicable way forward in the Chinese context, and the Chinese "constitutional moment" may be expected through such gradual changes.

Where to launch the reforms on the system of the People's Congress, and how to remove the control of the CCP from the Chinese power process? Based on the reflective comparisons in chapter 5, advocating judicial checks on administrative power may be a breakthrough. First, the

[1069] Mo Jihong, 'The system of the People's Congress is China's Fundamental Political System', *Citizen and Law*, No.4, (2009), 9-13.

effectiveness of judicial power in terms of the enforcement of constitutional systems in a certain country is argued to be the most common way that the constitutionalism is evaluated.[1070] Secondly, the Chinese issues of arbitrary power in local government finance, results from the failure of the accountability mechanisms written in the Chinese Constitution. The inability of the constitutional system is the inevitable consequence of the fusion of power in the name of the system of the People's Congress, and the absolute control of the CCP. In other words, the accumulation of powers in one hand, and the inaction of the judicial system as a device to check the administrative and legislative bodies, leads to Chinese issue. As discussed in chapter 2, the system of the People's Congress in the Chinese context, is the opposite of the separation of powers,[1071] so, the check of powers will be a more acceptable wording in the Chinese context. The CCP actually controls the administrative branch, therefore reinforcing the judicial role in checking administrative branch may work as a countermeasure for the absolute power of the CCP. Besides, China is changing profoundly since the "Reform and Opening-Up", and the introduction of market economy has greatly pushed economic improvement in China. The lagging behind of the political system has increasingly inspired political expectation of Chinese people.[1072] Under the influence of globalization, more and more foreign ideas and theories, including judicial review, judicial committee, and judicial courts etc., have come to Chinese cognizance, and this definitely plays a positive role in the potential reforming on Chinese judicial system. Against the backdrop, the views like "power should be caged" and "judicial reform should be pushed forward", are presented by senior leaders of the CCP, especially Xi Jinping.[1073] In 2014, the Administrative Litigation Law saw an amendment, and all administrative acts, including specific

[1070] Stephanie Balme & Michael W. Dowdle (edited), *Building Constitutionalism in China*, (New York: Palgrave Macmillan 2010), 2.

[1071] Zhang Mingjun, 'Why the System of the People's Congress should be upheld, and the Separation of Powers should be abandoned in China?' *Ideological and Theoretical Education*, No. 1 (2010), 46-51.

[1072] Nicholas Howson, 'Can the West Learn from the Rest? The Chinese Legal Order's Hybrid Modernity', *Hastings International and Comparative Law Review*, No.2 (2009), 815-830.

[1073] Xi Jinping, 'Explanation Concerning the CCP Central Committee Decision Concerning some Major Questions in Comprehensively Moving Governing the Country according to Law forward', *Theory Study*, No. 12 (2014), 20-27.

and abstract administrative acts, are challengeable in the people's courts.[1074] This seems to be a good chance to push the checks and balances between the executive and judicial powers in China. As mentioned in Page 272, relevant reforms in the Chinese context may proceed step by step through gradual changes, and England has provided some practical and referential experiences in this field.

[1074] See the article 2 of the Administrative Litigation Law.

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